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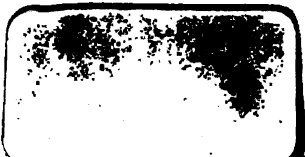


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THE
INDIAN CODE
OF
CRIMINAL PROCEDURE.

THE
INDIAN CODE
OF
CRIMINAL PROCEDURE.

Fifth Edition.

VIZ.,

THE CODE OF CRIMINAL PROCEDURE,
ACT X. 1872;

TOGETHER WITH

THE ALTERATIONS AND ADDITIONS MADE BY ACT XI. 1874.

WITH

RULINGS OF ALL THE HIGH COURTS IN INDIA, AND THE
CHIEF COURTS IN THE PUNJAUB, OUDH, AND
THE CENTRAL PROVINCES.

BY

FENDALL CURRIE, ESQ., OF LINCOLN'S INN,

BARRISTER-AT-LAW, CITY MAGISTRATE OF LUCKNOW.



With a Full and Copious Index.

LONDON:
JOHN FLACK & CO., 3, WARWICK COURT, HOLBORN.

1874.

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TO

SIR JOHN STRACHEY,

K. C. S. I.,

LIEUTENANT GOVERNOR NORTH WESTERN PROVINCES,

INDIA,

THIS WORK IS,

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RESPECTFULLY DEDICATED.

PREFACE.

THE object of this work is similar to that of the four Editions that have preceded it.

The several sections of the Code have been practically illustrated from authorized and generally recognized precedents.

The notes in the Commentary have been strictly confined to those Rulings in force at the present time, as being the only Rulings which can form useful precedents; all Rulings superseded, embodied, reversed, or altered by re-enactments of the Code have been allowed "to pass into the limbo of troublesome things which may safely be forgotten."

The portions of the sections commented on in the notes have been printed in italics in the body of the Code to make reference the more easy. The Commentary has been made as short as possible; giving on a settled plan the pith of decisions involving general principles of law, and keeping clear of

"The codeless myriad of precedent,
The wilderness of single instances."

An Introduction has been given, containing a short historical sketch of the Code of Criminal Procedure.

The following addition has been made to the text of the present Edition, viz. : the corresponding number of the section of the old Act has been given opposite the number of the present Act, as this materially helps to refer to the Reports published prior to the present re-enactment.

FENDALL CURRIE.

P.S.—After this introduction had been written, and this Edition was nearly out of the Press, a Bill was introduced into the Legislative Council of the Governor-General, for the purpose of amending the Code of Criminal Procedure. The said Bill passed into law in the month of May as Act XI. of 1874. The alterations and additions made by Act XI. of 1874 are incorporated into the present Edition.

F. C.

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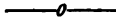
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INTRODUCTION.

A BRIEF HISTORICAL SKETCH OF THE CODE OF CRIMINAL PROCEDURE.

THE original Code of Criminal Procedure was drawn up by the Second Indian Law Commission. This Commission sat in England, and was appointed in 1853, to codify the Law of Procedure. They produced the first drafts of the Code of Criminal Procedure and the Code of Civil Procedure.

The duty of this Commission (a duty rendered gratuitously) was to consider and examine the recommendations of the Indian Law Commissioners for the reform of the judicial establishments, judicial procedure, and the laws of India; and further to consider the preliminary measures necessary for the purpose of amalgamating the supreme and Sudr courts in each of the Presidencies; so that a simple system of pleading and practice uniform throughout the whole jurisdiction might be adopted, one capable of being applied to the administration of justice in the inferior courts of India, and thus avoid the embarrassment which a diversity of procedure threw in the way of an appellate jurisdiction.

Of the duties this Commission was called upon to perform we have only to do with one, viz., the preparation of a Code of a simple and uniform procedure.

The history of the Criminal *Law* in India prior to the passing of the Indian Criminal Codes is given in the Introduction to the Penal Code. The first scheme for the *administration* of criminal justice dates from the time of Warren Hastings. In 1790, the then existing system of criminal justice was re-modelled by Lord Cornwallis; and in 1793 Regulations were passed re-enacting, with certain amendments and alterations, the measures of 1790. Down to this time (1790) the country had been governed through native agency, and according to native principles. The system introduced by these early Regulations was repeatedly altered so as to meet the wants of the country. Since 1834,—that is, since the Charter of William IV.,*—the rules according to which the substantive law was to be administered approached more and more towards the English system, so that when the Law Commissioners commenced their draft of the Code of Criminal Procedure they were able to take the system then prevailing in England as their model.

Act XXV. of 1861, the Code of Criminal Procedure, differed in no material way from the code as drafted by the Law Commissioners. This Act consolidated 237 Regulations and Acts. It came into operation on the 1st of January, 1862, the same day as the Indian Penal Code, and was nowise altered previously to 1868, except by three short Acts of the Indian Legislature, viz., Act XXXIII. of 1861, by which three alterations were made in the Schedule with a view to make certain offences triable by officers to whom the power of trying them had not been given by the Code; Act VIII. of 1860, by which sixteen further alterations were made in the Schedule with a similar object; and Act XV. of 1862, which enabled the Government to invest officers in Non-Regulation Provinces with certain powers.

* 3 & 4 Will. IV. c. 85.

In the beginning of 1868 an attempt was made to *re-enact* the Code of Criminal Procedure, and a Bill was brought in for this purpose. The three Acts above mentioned were incorporated in this Bill. The Bill contained 448 sections as unsystematic in their arrangement as the original Act of 1861. This Bill was not, as usual, referred to a Select Committee at once; it was merely introduced and published for a year. After the publication of the Bill, a despatch was received from the Secretary of State, expressing the wish of the Home Government that the subject of the general amendment of the Code should be left to the Indian Law Commissioners, and that the Governor-General's Council should confine itself to amending the provisions of the Code, without touching on any question involving matters of principle. Hence the original intention of the Council of the Governor-General was not attained, but merely an amending Act passed in the shape of Act VIII. of 1869.

This Act (VIII. of 1869) incorporated the three amending Acts previously passed, and contained solutions which the Government of India deemed most proper, of the questions which had been raised on the Code of Criminal Procedure, with the exception of certain points involving judicial principles which had been reserved for reference to her Majesty's Commissioners.

Act VIII. of 1869 came into operation on the 1st of June, 1869; and by section 16, Act XXVII. of 1870, Schedule I., five additions were made to the Schedule of Act XXV. of 1861 as amended by Act VIII. of 1869. These additions have now been absorbed in the Schedule to Act X. of 1872.

Act VIII. of 1869 was not regarded as a final measure, and a correspondence on several points connected with it took place between the Government of India and the Indian Law Commissioners, who gave their opinion on the

points submitted to them in their Seventh Report, dated 11th June, 1870. In the concluding sentence of this report the Commissioners say,—“Should it be thought convenient to consolidate the whole law of procedure in a single Act, this could be effected without difficulty by a process *little more than mechanical*.” I doubt very much whether the Select Committee of the Governor-General’s Council found the revision of the Code of Criminal Procedure a matter “to be effected without difficulty by a process little more than mechanical.”

As to the convenience of consolidating the whole law of procedure in a single Act, there is no doubt that the Government of India considered such a step desirable. For in a despatch, of the 21st December, 1868 (which was enclosed in the Duke of Argyll’s letter to the Law Commissioners, dated 23rd April, 1869), the Government of India observed “that at that moment there could scarcely be said to be a Code of Criminal Procedure. The original Code enacted in 1861 had already been amended by three subsequent Acts, and to these amending Acts there would be a fourth, of not inconsiderable length, under the instructions of Sir Stafford Northcote. There had, too, been a large amount of judicial decision on the construction of the Code, and the decisions were not generally known, and were occasionally conflicting, and they considered the questions that had been raised should be settled.” They further backed up their opinions by an attempt at re-enactment in 1868, as we have previously seen. In 1870 the Law Commissioners resigned, and it was after their official demise that the radical changes contained in Act X. of 1872 were passed.

On the receipt of the report of the Law Commissioners to the above communication, the Government of India again returned to the subject of re-enacting the Code of Criminal Procedure, and a draft Bill was prepared, founded

upon the Seventh Report of the Law Commissioners. This Bill having been introduced into Council, was published in the *Gazette* of India, for the purpose of attracting criticism on the questions raised by Mr. Fitzjames Stephen, in his speech introducing the Bill, so that these points might be considered by the public with the attention which their importance deserved. The Bill was also referred to a Select Committee for report, and a circular was forwarded to the local Governments for opinions on the provisions of the Bill, and for any further information that might be forthcoming. This circular was sent out in February, 1871, and replies were to be furnished by October of the same year. On the 30th February, 1872, the Select Committee published their report with regard to jurisdiction over European British subjects. These proposals were, as far as I remember, favourably accepted by the Press. Two months and a half after this, on the 16th April, 1872, Act X. of 1872, re-enacting the original Code of Criminal Procedure, received the assent of the Governor-General in Council, and passed into law. In the month of August, 1872, a Bill was introduced into the Legislative Council, then sitting at Simla, to defer the operation of the new Act till the 1st January, 1873. The *declared* object of the intended postponement was to prevent the courts of the higher class, which are civil as well as criminal courts, from being overdone with too much new matter; *e.g.* the Evidence Act I. of 1872, and the Contract Law Act IX. of 1872. On this Bill passing into law, it was stated, as a fresh proof of the expediency of the delay, that the translation of the Code of Criminal Procedure was so onerous a work, that, with all extra assistance, it could only be done just by the 1st of September, and therefore could not be read and digested by the native judges and practitioners in due time. These were the avowed reasons for the postponement: the latter of these was undoubtedly of some

weight ; but the question whether the Act could be translated in time for it to come into force on the 1st September, 1872, must have been duly considered when the provision as to its coming into force was enacted. The reason for the postponement given at the time when the request was made to allow the Bill to be introduced was rather in favour of the Act coming into force on the date originally proposed and enacted, than for postponement. For Act I. of 1872, the Evidence Act, which came into force on the 1st of September, 1872, and Act X. of 1872, the Code of Criminal Procedure pre-suppose each other. So that by the postponement of the latter Act until the 1st of January, 1873, there must have been for four months two sets of provisions in force, conflicting on points as to the law of evidence. The impression that got abroad from this postponement was, that the Government considered the Act to have been passed with undue haste, and that it ought therefore to be disallowed. Some said that the postponement was allowed, to gain time for consideration for the objections urged against some of the new provisions of the Bill, and more especially the enlarged jurisdiction of certain magistrates, which did not form part of the original design, on which the local Governments were consulted, ere the Bill was matured in committee. The obvious answers to such surmises are (1), that no Council constituted as the Legislative Council is constituted, and to which is attached so great responsibilities, could be guilty of passing any measure, let alone one so important as the Code of Criminal Procedure, with undue haste ; and (2), that if the Government contemplated any probability of the necessity of amending the Act in substance, a longer postponement would have been proposed to enable the Council in full conclave to reconsider the objections urged.

So strong was the public opinion on this subject, that it

called forth the following remarks from Sir John Strachey, in Council :—" He [Sir J. Strachey] had observed of late a disposition in some quarters to talk and write, as if the present Government were inclined to undo and pick holes in previous legislation, and to doubt its excellence. This Council was the last place in which there could be any necessity for repudiating so utterly unfounded and wrong a notion." The very necessity under which Sir John Strachey felt himself of volunteering this defence shows there was some occasion for the impression that had got abroad. What the Press asserted was this: that within six months of their passing the Evidence Act, the Code of Criminal Procedure, the Christian Marriage Bill, and the Oaths Bill were said to need amendment; and that if this was so, the Council ought not to have passed them; and if not, the Council ought not now to vote for their amendment. Anyhow, whatever the reasons for postponement were, other than those publicly avowed, if any other reasons ever existed, the new Code of Criminal Procedure came into force on the 1st of January, 1873, everywhere except Sindh, where the operation of the Act was postponed until the 1st of April, 1873, by Act XXVII. of 1872. To have wholly disallowed the Act would have caused no small inconvenience; to have amended it without giving it a trial would have been to admit that the measure had been passed with undue haste; to have opened up the whole subject again to discussion would not only have caused great loss of time and waste of labour already bestowed on the Code, but would have been a political mistake.

Now, let us turn for a moment to the alterations and additions made by Act X. of 1872.

(1.) The present Act sorts the Act of 1861, which had been put together with very little regard to arrangement and without any general plan, and re-arranges it on the

natural principle of commencing with the first step taken when a crime has been committed or is suspected, and follows the various steps from the time when the inquiry was first made till you get to the execution of the sentence of the Court. Exceptional incidents and supplementary arrangements are separately dealt with. This arrangement saves an infinity of time and labour to all who have to study and administer the codes.

(2.) As a fact, no magistrate knew the basis of his own jurisdiction; the law on the constitution of the Criminal Courts throughout India had got into such a state of complicated confusion, and it had been gravely suggested, and not without reason, that all the trials held in Bengal from 1829 to 1871 were invalid, so that, for close on half a century, men and women had been unlawfully hanged, fined, and imprisoned. The present Act puts all such deplorable doubts beyond the reach of uncertainty for the future.

(3.) The present Act lays down clearly the position in which the subordinate magistrates stand to the magistrate of the district, and in what position the magisterial officers stand to the police. As long as this point remained undecided, it gave rise to much heart-burning, innumerable disputes, and sometimes to failure of justice; and, before it was finally decided, was made, like most questions of importance are in India, the subject of vehement controversial discussion, tinged with no small amount of personal animosity. That the question has been set at rest, and that a matter of such practical importance has been clearly defined, is a subject of congratulation. Long may it rest buried away deep under the large amount of talk and prodigious amount of ink shed over its grave.

(4.) The present Act provides for the appointment of public prosecutors, and puts clearly the law relating to

venue and indictments ; it defines the duties of troops and magistrates in cases of disturbance* ; and it disposes of over two thousand cases decided by the different High Courts, on the provisions of the original Code of Criminal Procedure.

(5.) The present Act now, for the first time, makes it compulsory for the judge to furnish a copy of his charge to the jury, on application to any person affected by his sentence or order ; and power is given to the High Court of setting aside the verdict of the jury and ordering a new trial, if such Court is of opinion that the jury was misdirected by the judge.

(6.) The present Code allows of enhancement of punishment on appeal. This is nothing new ; it is merely a return to the practice of Act XXV. of 1861. The reasons for reverting to the old law are thus given by the Lieutenant-Governor of Bengal, in his speech in Council :—
“Where we afforded the greatest facilities for an appeal to the superior tribunals, the superior tribunal to whom the criminal appealed should have the power to decide what was the proper punishment for the offence ; and if that tribunal considered that the punishment that had been awarded was inadequate, it should be in its power to award an enhanced punishment. More than that, it appeared to him that there was a practical necessity for such a provision. Our law as to criminal appeals was the most liberal law in the world : there was no law that was so liberal as to

* Section 480 renders it lawful to disperse an assembly of five or more persons likely to cause a disturbance of the public peace (sec. 151, I. P. C.). Under section 481 the civil authorities can call to their assistance any persons, whether soldiers or not, to disperse the assembly ; the proviso being that the soldiers are not to act as troops, but as ordinary citizens. The mode of dispersing the assembly and the management of the troops, where military force is requisite to disperse the assembly, is left entirely to the discretion of the Commanding Officer.

allow a person to say to his gaoler, 'I wish to appeal'; and the gaoler was bound to send the appeal on to the judge, without expense or trouble to the appellant. The result of such a law was, that the prisoner could lose nothing by his appeal, and might possibly gain something; and the consequence of such a state of things was that, in some districts, *there was no such thing as a case that had not been appealed.*"

(7.) The present Code gives the local Governments power to authorize an appeal in certain cases of acquittal. This power, it must be borne in mind, is nowhere given to a private prosecutor, but is limited to Government. Had this power been extended to private prosecutors, it would undoubtedly have put a dangerous weapon for private revenge into hands well versed in turning it to the best, or rather worst, account. As the provision stands in the Code, it is politically a wise enactment.

(8.) The new Code provides a summary jurisdiction in certain cases. It provides for recording in a more summary manner the proceedings in a large class of petty cases. In such cases the courts were grievously overburdened with too bulky and minute a record. The fact was, that the outcry of too little record, at the time the Criminal Procedure was framed, caused the framers to err on the side of too much writing.

(9.) The present Act made certain alterations as to trial by jury. Instead of convicting a man, if found guilty by a larger majority of the jury, and trying him again if found guilty by a smaller majority, "the concurrence of the judge was proposed to be the condition of the triumph of the majority." Considering that this system of trial by jury is foreign to India, and that its present existence is limited to some dozen districts in the whole of India, and even there at the will of the local Governments, the marvel is that the system was not wholly abolished.

(10.) In the matter of the European-British subject, the present Code advanced a step towards a general and uniform system, to be applied to all persons without distinction. By some it was considered that in requiring the judges and magistrates, by whom Europeans are tried, to be themselves Europeans, too much was conceded to the feelings of Europeans. By others, it was urged that in empowering first-class magistrates, being also Europeans and justices of the peace, to inflict upon Europeans three months' imprisonment, too great a concession is made to the opposite view of the subject. Mr. Fitzjames Stephen said that this Chapter VII. of the Code was the result of a compromise; "a matter of more or less give and take." If there is one innovation in the present Act which is stronger against attack than another, it is this. Every alteration in the law henceforth must be in the direction of making the law alike supreme over all her Majesty's subjects.

(11.) The present Code provides for magistrates sitting together as a bench, and in such cases makes the magistrate of the district practically a kind of chief justice over the magisterial courts of his district, in making rules for the guidance of benches, &c.

These, if not all, are the chief alterations and additions made to the Code of Criminal Procedure by the present Act.

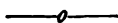
The law of procedure, as now enacted, puts an end to many abuses and technicalities, and greatly simplifies the procedure of the Criminal Courts. Artificial assumptions of technical shadows and obviously absurd fictions find no shelter under the plain and straightforward language of the Code, and it makes a clean sweep of quibbles.

As to the question, After what periods should the Code be re-enacted? it is impossible to make a hard-and-fast rule, and fix any definite period. The suggestion for

re-enactment must come from the Superior Judges, who apply the Code; the propriety of a new edition of the Code must be determined by the Governor-General in Council in each particular instance, with regard for public expediency.

F. C.

PROCEDURE IN CRIMINAL COURTS.



AN ACT *for Regulating the Procedure of the Courts of Criminal Judicature.*

WHEREAS it is expedient to consolidate and amend the law regulating the Procedure of the Courts of Criminal Judicature, other than the High Courts in Presidency towns in the exercise of their original criminal jurisdiction, and the Courts of Police Magistrates in such towns ; It is hereby enacted as follows :

Preamble.



PART I.

CHAPTER I.

PRELIMINARY, REPEAL, LOCAL EXTENT, AND DEFINITIONS.

Short title.

(1) 1. This Act may be called "The Code of Criminal Procedure."

Local extent.

It extends to the whole of British India, but shall not, except as hereinafter provided, affect the procedure of the High Courts or Police Magistrates in Presidency towns ;

Commencement.

And it shall come into force on the first day of September, 1872.

(1) By Act XVII of 1872, Section 1, it was enacted as follows :—

1. The said Act No. X of 1872 shall come into force, not on the first day of September, 1872, but on the first day of January, 1873.

The Code of Criminal Procedure, Act XXV of 1861, came into operation on the 1st January, 1862, and was nowise altered previous to 1868, except by three short Acts of the Indian Legislature, viz. : Act XXXIII of 1861, by which three alterations were made in the schedule, with a

view to make certain offences triable by officers to whom the power of trying them had not been given by the Code; Act VIII of 1866, by which sixteen further alterations were made in the schedule, with a similar object; and Act XV of 1862, which enabled the Government to invest officers in non-Regulation Provinces with certain powers. Act VIII of 1869 was passed on the 12th March, 1869, and incorporated the three amending Acts previously passed, and contained solutions which the Government of India deemed most proper of the questions which had been raised on the C. C. P., with the exception of certain points involving judicial principles, and which had been reserved for reference to Her Majesty's Commissioners. Act VIII of 1869 came into operation on 1st June, 1869; and by Section 16, Act XXVII of 1870, Schedule I, five additions were made to the schedule of Act XXV of 1861, as amended by Act VIII of 1869. These have now been absorbed in the schedule to this Act.

By Government notification, No. 143, dated 18th July, 1872, his Excellency the Governor-General was pleased to apply to the province of Mysore the provisions of Act X of 1872, with effect from the 1st September, 1872.

By notification No. 1,538, dated 16th August, 1872, Act XXV of 1861, as amended by Act VIII of 1869, was extended to the tract of land ceded to the British Government in the year 1863, and lying between the railway station at Satna and the eastern boundary of the Jabalpur district.—*Gazette of India*, August 17th, 1872.

Mr. Stephens, in his speech, presenting the Report of the Select Committee on this Bill, gave the History of the Criminal Procedure Code as follows:—

“It has been built up by slow degrees by the labour of successive generations of legislators ever since legislation first began in this country. The very earliest Regulations of 1793 provide for the establishment of a system for the administration of criminal justice. This system was repeatedly altered, varied, and re-adjusted, so as to meet the varying wants of the country, and to supply the requirements which were shown by experience to exist. The mass of legislation which thus accumulated was very large, and when the Penal Code was passed in 1860, it was considered a matter of pressing importance to prepare a Code of Criminal Procedure as quickly as possible, in order to act as a companion to it. Act XXV of 1861 was the result. It threw together all the existing law on the subject to which it related, and so consolidated an immense mass of Regulations and Acts. I will not say how many, but I think they were counted by the hundred. Act XXV of 1861 was drawn by men thoroughly well acquainted with the system with which they were concerned; but I am inclined to doubt whether they did not know it rather too well, for they certainly threw the various provisions together with very little regard to arrangement, and without any general plan. Various Acts for the amendment of the Code became necessary after it had been passed. These were consolidated by Act VIII of 1869. The result was rather to increase than to diminish the confusion which had previously existed. Act VIII of 1869 was not regarded as a final measure, and a correspondence on several points connected with it, and with the further reform of the system of criminal procedure, took place between the Government of India and

the Indian Law Commissioners, who gave their opinion on various matters submitted to them in one of their very latest reports. This report was the cause of the present Bill."

The present Act is simply an emendation of the existing Code; that Code has been re-arranged and in some points amended.

2. The enactments, mentioned in the first schedule hereto annexed, are repealed to the extent specified in the third column of the said schedule.

Wherever a special form of procedure is prescribed by any law, not expressly repealed in the first schedule to this Act, it shall not be deemed to have been impliedly repealed by reason of its being inconsistent with the provisions of this Code.

In every Act passed before this Act, in which reference is made to the Code of Criminal Procedure, such reference shall be taken to be made to this Act.

In every Act passed before this Act, the expressions "officer exercising the powers of a Magistrate," "Subordinate Magistrate, first class," and "Subordinate Magistrate, second class," shall, respectively, be deemed to mean "Magistrate of the first class," "Magistrate of the second class," and "Magistrate of the third class," as defined in this Act.

The references made in the enactments specified in column one of the fifth schedule hereto to the sections of the former Code of Criminal Procedure specified in column two of the said schedule, shall be deemed to be made to the sections of this Code directed in the third column of the said schedule to be substituted for the said sections in column two.

Notifications published and orders made under any section of any Act hereby repealed, shall be deemed to have been published and made under the corresponding section of this Act.

Amendment 1 of 1874.—In Section 2, after the fourth paragraph, the following shall be inserted (namely):—

"The cases in which the Police may arrest without

warrant or not, in the case of each offence under the Indian Penal Code or any other law referred to in section eight ;

whether a warrant or a summons shall ordinarily issue in the first instance,

whether the offence is bailable or not, and

the Court by which the offence is triable,

are indicated respectively by the third, fourth, fifth, and seventh columns of the fourth schedule hereto annexed."

3. Cases pending in any Criminal Court when this Act comes into force shall be decided as far as may be according to the procedure provided in this Act.

Pending cases.

(2 to 20) 4. In this Act the following words and expressions have the following meanings, unless a different intention appears from the context :—

"Special law."

"Special law" means a law applicable to a particular subject.

"Local law."

"Local law" means a law applicable to a particular part of British India.

"Investigation."

"Investigation" includes all the proceedings by the Police authorized by this Act, for the collection of evidence.

"Inquiry."

"Inquiry" includes any inquiry which may be conducted by a Magistrate or Court under this Act.

"Inquired into."

"Inquired into" means and includes every proceeding preliminary to trial.

"Trial."

"Trial" means the proceedings taken in Court after a charge has been drawn up, and includes the punishment of the offender.

It includes the proceedings under Chapters XVI and XVIII from the time when the accused appears in Court.

Trial.—From this definition, taken with that of "*inquiry*" and "*inquired into*," it appears that proceedings taken in Court prior to the drawing up of a charge are "*inquiries*"; but when a charge has been drawn up, then the trial commences.

Chap. XVI relates to trials of summons cases by magistrates; and Chap. XVIII to summary trials. Under neither of these is it requisite to draw up a charge; nevertheless, under the provisions of this section, the proceedings under Chapters XVI and XVIII are trials from the time of the appearance of the accused in Court.

"Judicial Proceeding" means any proceeding in the course of which evidence is or may be taken, or in which any judgment, sentence, or final order is passed on recorded evidence.

"Written" includes "printed," "lithographed," "photographed," and "engraved."

"Criminal Court" means and includes every Judge or Magistrate, or body of Judges or Magistrates, inquiring into or trying any criminal case or engaged in any judicial proceeding.

"Province" means the territories under the Government or Administration of any *Local Government*.

Local Government.—For definition of, see Act I of 1865, Section 2, clause 10.

"Presidency town" means the local limits of the ordinary original civil jurisdiction of the High Courts of Calcutta, Madras, or Bombay.

"High Court" means, in reference to proceedings against European British subjects (71), or persons jointly charged with European British subjects, the High Courts of Calcutta, Madras, Bombay, the High Court for the North-Western Provinces, and the Chief Court of the Punjab.

In other cases "High Court" means the highest Court of criminal appeal or revision in any province.

"Session case" means and includes all cases specified in column seven of the fourth schedule to this Act as cases triable by the Court of Session, and all cases which Magistrates commit to a Court of Session, although they might have tried them themselves.

In the case of offences created by special or local laws, "Session case" means cases which are triable by the Court of Session, or which the Magistrate commits to the Court of Session, though he might have tried them himself.

"Magistrate's case" means and includes all cases specified in column seven of the fourth schedule to this Act as cases triable by Magistrates, and all cases which Magistrates try themselves, although they might have committed them for trial to a Court of Session.

This paragraph clearly determines when a case is to be considered a Magistrate's case or Session case.

Sessions Case, Magistrate's Case.—These phrases only occur once in the whole Code,—“Magistrate's case” in Section 74, and “Sessions case,” in Section 296. The definitions of these cases here given in this Section 4 are in great part obviously inapplicable to the sections above mentioned. It would have been better to have retained in the place of these cumbersome definitions the plain unambiguous language of the old Code, Section 435.

“Cognizable offence or case” means an offence for or a case in which a Police officer may, by any law in force for the time being, arrest without warrant.

“Non-cognizable offence or case” means an offence for or a case in which a Police officer may not arrest without warrant.

“Summons case” means an offence of the class described in section one hundred and forty-eight.

“Warrant case” means an offence of the class described in section one hundred and forty-nine.

“Bailable offence or case” means an offence for a case in which bail may be taken under the fourth schedule to this Act, or by any other law in force for the time being.

“Non-bailable offence or case” means an offence for or a case in which bail may not be taken under the fourth schedule to this Act, or by any law in force for the time being.

Several additions have been made to this Chapter of definitions. A precise meaning has been assigned to “investigation” “inquiry” “trial,” &c. These definitions will, it is hoped, render the provisions of the Code more distinct and intelligible. It must at the same time be noted that several definitions of the old Code find no place in the new. These are “British India,” “moveable property,” “number,” “gender,” “determined,” “Court of Justice,” “Court of Session,” “Magistrate of a District,” “Magistrate,” “the powers of a Magistrate,” “any of the powers of a Magistrate,” “District,” “Division of a District,” “year,” and “month.” Of the above terms, definitions of “British India,” “moveable property,” “number,” “gender,” “Magistrate,” “year,” and “month,” will be found in Act I, 1868, the General Clauses Act.

Amendment 2 of 1874.—To Section 4 the following clause shall be added (namely):—

“In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions.”

PART II.

CONSTITUTION AND POWERS OF THE CRIMINAL COURTS.

This Act contains, as Mr. Stephens puts it, "a complete body of law on three distinct, but closely related subjects."

- (1.) The constitution of the Criminal Courts.
- (2.) The conduct of Criminal proceedings.
- (3.) The prosecution of crimes by interference beforehand.

The first of these subjects is distinctly and systematically laid down in Chapters II, III, and IV, which enables the repeal of a large number of Acts and Regulations, through which the subject-matter of the chapters in question was scattered in the most obscure and fragmentary manner. The law on the constitution of the Criminal Courts throughout India had got into such a state of complicated confusion, that it had been gravely suggested, and not without reason, that all the trials held in Bengal from 1829 to 1871 were invalid, so that, for close on half a century, men and women had been unlawfully hanged, fined, and imprisoned. The present Act puts all such deplorable doubts beyond the reach of uncertainty for the future.

In Part II, Chapter IV, *post*, provision is made for the constitution of all Criminal Courts subordinate to the High Court. Besides the ordinary Courts, power is given to the Local Government to appoint additional Sessions Judges (Section 17) and Assistant Sessions Judges (Section 18), whose powers will be on the same footing as the Assistant Sessions Judges at present existing in Bombay.

CHAPTER II.

OF CRIMINAL COURTS.

Grades of Criminal
Courts.

5. Besides the High Courts, shall be four grades of Criminal Courts in British India :—

- I.—The Court of the Magistrate of the 3rd class.
- II.—The Court of the Magistrate of the 2nd class.
- III.—The Court of the Magistrate of the 1st class.
- IV.—The Court of Session.

What Officers to
hold inquiries.

(21) 6. All inquiries by Magistrates shall be held according to the provisions hereinafter contained.

(21) 7. All criminal trials in British India shall be held before the Courts specified in the fourth schedule to this Act, or before the Courts

What Courts to try
offences.

specified in any law by which the offence is created, according to the provisions hereinafter contained. (*Vide Section 50, post.*)

(21) 8. Offences punishable under any law, other than the Indian Penal Code, containing no distinct provision as to the Court or Officer before which or before whom they are to be tried, may be inquired into and tried, according to the provisions hereinafter contained, by the Criminal Courts appointed under this Act. But no such Court shall award any sentence in excess of its powers.

Offences under local
and special laws.

A Magistrate of the third class shall not try any such offence unless it is punishable with less than one year's imprisonment, nor shall a Magistrate of the second class try any such offence unless it is punishable with less than three years' imprisonment.

This Section provides that the Criminal Courts shall have jurisdiction in offences created by special and local laws which are silent as to the tribunal intended, but no Court is to inflict a punishment in excess of its powers.

9. All Judges of Criminal Courts, other than the High Courts, and Magistrates shall be appointed and may be removed by the Local Government; but such officers as are now appointed or removed by the Government of India shall continue to be so appointed or removed.

Appointment and
removal of Judges and
Magistrates.

10. All existing Judges and Magistrates shall be deemed to have been appointed under this Act.

Saving of existing
incumbents.

(24, 25) 11. Offences committed by European British subjects shall be inquired into and tried according to the provisions of Chapter VII, and not otherwise; but the other provisions of this Act shall apply to all persons without distinction of race, unless a contrary intention is expressed.

Inquiry and trial in
case of European British
subjects.

To clear up the doubt which has hitherto existed, as to whether all portions of the Code apply to European British subjects, provision has been made that the Criminal Procedure shall be applicable to all persons alike, except in respect of the special privileges above described (Section 11); and in respect of orders under Chapter XXXVII to give security in cases of bad livelihood (Section 517).

CHAPTER III.

OF COURTS OF SESSION.

This chapter deals with the Constitution of Courts of Session, and comprises the provisions of several Regulations and Acts which have been repealed by Schedule I.

Sessions Divisions. 12. Every province shall be divided into Sessions Divisions.

Power to alter Divisions. 13. The Local Government shall have power to alter, from time to time, the number or extent of such divisions.

Existing local jurisdictions of Sessions Courts to be Sessions Divisions. 14. The existing local jurisdictions of Courts of Session shall be Sessions Divisions, unless and until they are so altered.

One Court for each Division. (22) 15. There shall be a Court of Session in every Sessions Division.

It shall have power to try any offence and to pass upon any offender any sentence authorized by law, subject to the provisions of this Act.

Appointment and powers of Sessions Judges. 16. There shall be a Sessions Judge for every Sessions Division. The Sessions Judge shall exercise all the powers of the Court of Session in his Sessions Division.

Read with this section Sections 231 and 472, *post*, as to when a Court of Session can take cognizance of an offence as a Court of original jurisdiction, and for what offence.

Appointment and powers of Additional and Joint Sessions Judges. 17. The Local Government may appoint Additional Sessions Judges or Joint Sessions Judges, who shall exercise all the powers of a Court of Session in one or more Sessions Divisions in which they may be directed to act, but shall try such cases only as the Local Government directs them to try, or as the Sessions Judge of the Division makes over to them for trial.

Appointment and powers of Assistant Sessions Judge. (22) 18. The Local Government may also appoint Assistant Sessions Judges, who shall exercise all the powers of a Court of Session in the Sessions Division to which they

may be attached, except the power of hearing appeals, and of passing sentences of death, or transportation, or imprisonment for more than seven years; but they shall try those cases only which the Sessions Judge of the Sessions Division makes over to them either by general orders or by a special order.

Any sentence of more than three years' imprisonment passed by an Assistant Sessions Judge shall be subject to confirmation by the Sessions Judge. The Sessions Judge may either confirm, modify, or annul such sentence of the Assistant Sessions Judge.

Amendment 3 of 1874.—To Sections 18 and 36, the following words shall be added (namely):—

“or if he think further inquiry or additional evidence upon any point bearing upon the guilt or innocence of the accused person to be necessary, he may direct such inquiry or evidence to be made or taken.”

Section 270, *post*, provides for appeals from the conviction of Assistant Sessions Judges.

CHAPTER IV.

OF MAGISTRATES AND THEIR POWER.

This chapter defines the powers of Magistrates and their relations to each other, and in what position the magisterial officers stand to the police. As long as this point remained undecided, it gave rise to much heartburning, innumerable disputes, and sometimes to failure of justice; and before it was finally decided, was made, like most questions of importance in India, the subject of vehement controversial discussion, tinged with no small amount of personal animosity. That the question has been set at rest, and that a matter of such practical importance has been clearly defined, is a subject of congratulation. As regards their judicial powers, Magistrates are divided into three classes. Their miscellaneous powers are thirty-seven in number, and these are specified in Section 21. Sections 22—29 specify which of these powers are to be inherent in each class of Magistrates, and which of them may be conferred on Magistrates by the Local Governments, and the Magistrate of the District respectively. “We have grouped,” say the Committee in their Report, “in several consecutive sections, the powers judicial and miscellaneous, of Magistrates.” There are (says Mr. Stephens) three separate points of view in which Magistrates must be regarded. *First*, they have different judicial powers; *secondly*, they have different powers in a multitude of miscellaneous matters connected with procedure, and these miscellaneous powers are liable to variation in particular cases; and *thirdly*, they stand in various relations to each other. To describe the matter as clearly and shortly as possible is the object of this Chapter IV.

19. Magistrates shall be either :—

Magistrates to be of three classes. Magistrates of the first class,
Magistrates of the second class, or
Magistrates of the third class.

(22) 20. The powers of Magistrates in respect to the trial of offences and to passing sentences on persons convicted of them are as follows :—

Sentences which Magistrates may pass. Powers of Magistrates, first class. Magistrates of the first class may pass the following sentences :—

Imprisonment not exceeding the term of two years (including such solitary confinement as is authorized by law) ;
Fine to the extent of one thousand Rupees ;
Whipping.

Powers of Magistrates, second class. Magistrates of the second class may pass the following sentences :—

Imprisonment not exceeding six months (including such solitary confinement as is authorized by law) ;
Fine not exceeding two hundred Rupees ;
Whipping.

Powers of Magistrates, third class. Magistrates of the third class may pass the following sentences :—

Imprisonment not exceeding one month ;
Fine not exceeding fifty Rupees.

A Magistrate of the third class may not pass a sentence of solitary confinement, or of whipping.

Any Magistrate may pass any lawful sentence, combining any of the sentences which he is authorized by law to pass.

Explanation.—A Magistrate may award *imprisonment* in default of payment of fine, in addition to the full term of imprisonment which, under this section, he is competent to award.

Imprisonment means rigorous or simple ; *vide* Act I of 1868, Section 2, Clause 18.

This section coupled with the schedule gives a general jurisdiction to all magistrates to try certain offences and pass certain sentences. Chapter X empowers the Police to investigate certain offences, and to bring the accused with all the necessary evidence before the Magistrate. Section 123, Section 190, and subsequent sections, provide for the trial by the Magistrate of persons so brought before him.

21. In addition to the powers given in Section 20, the following powers are conferred, as hereinafter provided, upon Magistrates by this Act :—

Powers conferred
upon Magistrates.

- (1.) Power to make over cases to a Subordinate Magistrate. (s. 44.)
- (2.) Power to pass a sentence on proceedings recorded by a Subordinate Magistrate. (s. 46.)
- (3.) Power to withdraw cases and to try or refer them to trial. (s. 47.)
- (4.) Power to withdraw or refer appeals from convictions by Magistrates of the second or third classes. (s. 47.)
- (5.) Power to arrest an accused person found in Court. (s. 104.)
- (6.) Power to order the Police to investigate an offence (s. 110.)
- (7.) Power to record confessions or statements during a Police investigation. (s. 122.)
- (8.) Power to authorize detention of a person during a Police investigation. (s. 124.)
- (9.) Power to hold an inquest. (s. 135.)
- (10.) Power to entertain complaints and receive Police reports. (s. 141.)

In construing these terms in this section and the secular expressions in Sections 23, 25, and 27, the addition of the words "Section 141" in brackets shows that the police reports referred to are only such reports as are indicated by Section 141. Now this section forms a portion of Part IV of the Code which relates to proceedings to compel appearance; and a comparison of this section with those which precede and follow it seems clearly to indicate that the police reports referred to are only those on which it may be necessary, or at least possible, to issue a process.

- (11.) Power to entertain cases without complaint. (s. 142.)
- (12.) Power to commit for trial. (s. 143.)
- (13.) Power to issue process for person within jurisdiction who has committed an offence outside Magistrate's local jurisdiction. (s. 157.)
- (14.) Power to direct warrant to landholder. (s. 162.)
- (15.) Power to arrest offender in presence of Magistrate. (s. 166.)
- (16.) Power to endorse warrant, or to order the removal of an accused person arrested under a warrant. (ss. 168 and 170.)
- (17.) Power to issue proclamation in cases judicially before him. (ss. 171 and 353.)
- (18.) Power to attach and sell property in cases judicially before him. (ss. 172 and 354.)

- (19.) Power to try summarily. (s. 222.)
- (20.) Power to hear appeals from convictions by Magistrates of the second and third classes. (s. 266.)
- (21.) Power to call for proceedings. (ss. 295 and 296.)
- (22.) Power to quash convictions in certain cases. (s. 328.)
- (23.) Power to issue a search warrant for letter in Post Office. (s. 369.)
- (24.) Power to endorse a search-warrant and order delivery of thing found. (ss. 372, 373, and 376.)
- (25.) Power to issue search-warrant otherwise than in the course of an inquiry. (s. 377.)
- (26.) Power to revise bail orders. (s. 398.)
- (27.) Power to sell perishable property of a suspicious character. (s. 415.)
- (28.) Power to sell suspicious or stolen property. (s. 417.)
- (29.) Power to demand security to keep the peace. (s. 491.)
- (30.) Power to discharge recognizances to keep the peace. (s. 500.)
- (31.) Power to demand security for good behaviour. (ss. 504 and 505.)
- (32.) Power to discharge person bound to be of good behaviour. (s. 511.)
- (33.) Power to issue order to prevent obstruction, &c. (s. 518.)
- (34.) Power to issue order prohibiting repetition of nuisance. (s. 519.)
- (35.) Power to make orders, &c., in local nuisance cases. (s. 521.)
- (36.) Power to make orders, &c., in possession cases. (s. 530.)
- (37.) Power to make orders of maintenance. (s. 536.)

Powers common to
all Magistrates.

22. Magistrates of all classes shall, as such, have the following powers :—

- (1.) Power to arrest an accused person found in Court (s. 104.)
- (2.) Power to record confessions or statements during a Police investigation. (s. 122.)
- (3.) Power to authorize detention of a person during a Police investigation. (s. 124.)
- (4.) Power to arrest offender in the presence of Magistrate. (s. 166.)
- (5.) Power to endorse warrant, or to order the removal of an accused person arrested under a warrant. (ss. 168 and 170.)
- (6.) Power to issue proclamation in cases judicially before him. (ss. 171 and 353.)

- (7.) Power to attach and sell property in cases judicially before him. (ss. 172 and 354.)
- (8.) Power to endorse a search-warrant and order delivery of thing found. (ss. 372, 373, and 376.)
- (9.) Power to sell perishable property of a suspicious character. (s. 415.)

Powers which Local Government and Magistrate of the District may confer on Magistrates of third class.

23. In addition to the powers mentioned in Section 22, a Magistrate of the third class may be invested with the following powers :—

- (a.) By the Local Government—
 - (1.) Power to hold inquests. (s. 135.)
 - (2.) Power to entertain complaints of offences in cases in which he has jurisdiction to try or to commit for trial. (s. 141.)
 - (3.) Power to commit for trial. (s. 143.)
 - (4.) Power to issue order to prevent obstruction. &c. (s. 518.)
 - (5.) Power to issue order prohibiting repetition of nuisance. (s. 519.)
- (b.) By the Magistrate of the District—
 - (1.) Power to hold inquests. (s. 135.)
 - (2.) Power to entertain complaints of offences in cases in which he has jurisdiction to try or to commit for trial. (s. 141.)
 - (3.) Power to issue order to prevent obstruction, &c. (s. 518.)
 - (4.) Power to issue order prohibiting repetition of nuisance. (s. 519.)

Powers of Magistrates of the second class.

24. Magistrates of the second class shall, as such, in addition to the powers mentioned in Section 22, have the following power :—

- (1.) Power to order the Police to investigate an offence in which the Magistrate has jurisdiction to try or to commit for trial. (s. 110.)

25. In addition to the powers given and referred to in Section 24, a Magistrate of the second class may be invested with the following powers :—

Powers which may be conferred on Magistrates of second class.

- (a.) By the Local Government—
 - (1.) Power to hold inquests. (s. 135.)

- (2.) Power to entertain complaints and receive Police reports in cases in which he has jurisdiction to try or to commit for trial. (s. 141.)
- (3.) Power to entertain without complaint cases which he has jurisdiction to try or to commit for trial. (s. 142.)
- (4.) Power to commit for trial. (s. 143.)
- (5.) Power to issue order to prevent obstruction, &c. (s. 518.)
- (6.) Power to issue order prohibiting repetition of nuisance. (s. 519.)
- (b.) By the Magistrate of the District—
 - (1.) Power to hold inquests. (s. 135.)
 - (2.) Power to entertain complaints and receive Police reports in cases in which he has jurisdiction to try or to commit for trial. (s. 141.)
 - (3.) Power to issue order to prevent obstruction, &c. (s. 518.)
 - (4.) Power to issue order prohibiting repetition of nuisance (s. 519.)

26. Magistrates of the first class, as such, in addition to the powers mentioned in Sections 22 and 24, have the following powers :—

Powers of Magistrates of first class.

- (1.) Power to commit for trial. (s. 143.)
- (2.) Power to issue search-warrant otherwise than in the course of an inquiry. (s. 377.)
- (3.) Power to demand security to keep the peace. (s. 491.)
- (4.) Power to demand security for good behaviour. (ss. 504 and 505.)
- (5.) Power to make orders, &c., in possession cases. (s. 530.)
- (6.) Power to make orders of maintenance. (s. 536.)

27. In addition to the powers given and referred to in Section 26, a Magistrate of the first class may be invested with the following powers :—

Powers which may be conferred on Magistrates of first class.

- (a.) By the Local Government—
 - (1.) Power to make over cases taken up on complaint, &c., to a Subordinate Magistrate. (s. 44.)
 - (2.) Power to hold inquests. (s. 135.)
 - (3.) Power to entertain complaints of offences, and receive Police reports. (s. 141.)
 - (4.) Power to entertain cases without complaint. (s. 142.)
 - (5.) Power to issue process for person within jurisdiction who has committed an offence outside Magistrate's local jurisdiction. (s. 157.)

- (6.) Power to try summarily. (s. 222.)
- (7.) Power to hear appeals from convictions by Magistrates of the second and third classes. (s. 266.)
- (8.) Power to sell suspicious or stolen property. (s. 417.)
- (9.) Power to issue order to prevent obstruction, &c. (s. 518.)
- (10.) Power to issue order prohibiting repetition of nuisance. (s. 519.)
- (11.) Power to make orders, &c., in local nuisance cases. (s. 521.)
- (b.) By the Magistrate of the District—
 - (1.) Power to hold inquests. (s. 135.)
 - (2.) Power to entertain complaints of offences, and receive Police reports. (s. 141.)
 - (3.) Power to issue order to prevent obstructions, &c. (s. 518.)
 - (4.) Power to issue order prohibiting repetition of nuisance. (s. 519.)

28. Magistrates who, under the provisions of Section 40, are Magistrates of Divisions of Districts shall, as such, have all the powers given to Magistrates of the first class, and referred to in Section 26, and, in addition, shall have the following powers:—

- (1.) Power to make over cases to a Subordinate Magistrate. (s. 44.)
- (2.) Power to pass sentence on proceedings recorded by a Subordinate Magistrate. (s. 46.)
- (3.) Power to withdraw cases, but not appeals, and to try or refer them for trial. (s. 47.)
- (4.) Power to hold inquests. (s. 135.)
- (5.) Power to entertain complaints of offences, and receive Police reports. (s. 141.)
- (6.) Power to entertain cases without complaint. (s. 142.)
- (7.) Power to issue process for person within jurisdiction who has committed an offence outside Magistrate's local jurisdiction. (s. 157.)
- (8.) Power to sell suspicious or stolen property. (s. 417.)
- (9.) Power to issue order to prevent obstruction, &c. (s. 518.)
- (10.) Power to issue order prohibiting repetition of nuisance. (s. 519.)
- (11.) Power to make orders in local nuisance cases. (s. 521.)

Provided that, if a Magistrate of a Division of a District

exercise the powers of a Magistrate of the second class, he shall not have power to demand security to be of good behaviour.

29. In addition to the powers given and referred to in Section 28, the Local Government may confer on a Magistrate of a Division of a District, exercising the powers of a Magistrate of the first class, the following powers :—

Powers which Local Government may confer on Magistrates of Divisions of Districts.

- (1.) Power to try summarily. (s. 222.)
- (2.) Power to hear appeals from convictions by Magistrates of the second and third classes. (s. 266.)

30. Magistrates of Districts may, as such, exercise all the powers mentioned in Section 21.

Powers of Magistrates of Districts.

31. All other powers given by this Act, or by any other law in force, may be exercised by the officers or Courts to whom or to which they are given.

Saving of other powers.

Irregularities which do not vitiate proceedings.

32. If any Magistrate, not being empowered by law in that behalf, does any one of the following things :—

- (1.) If he makes over a case, taken up on complaint, &c., to another Magistrate,
- (2.) If he withdraws a case and tries it himself, or refers a case for trial,
- (3.) If he orders the Police to investigate an offence,
- (4.) If he holds an inquest,
- (5.) If he entertains a complaint or receives a Police report,
- (6.) If he issues process for the apprehension of a person within his local jurisdiction who has committed an offence outside his local jurisdiction,
- (7.) If he issues a search-warrant otherwise than in the course of an inquiry,—his proceedings shall not be set aside on the ground that he was not so empowered.

33. If any Magistrate, not being empowered by law, commits an accused person to take his trial before a Court of Session or High Court, the Court to which the commitment was made may, after perusal of the proceedings, accept the

When irregular commitments may be validated.

commitment if it considers that the accused person has not been prejudiced, unless the accused person has objected to the jurisdiction of the committing Magistrate during the inquiry and before the order of commitment.

If such Court considers that the accused person was prejudiced, or if he objected to the jurisdiction of the committing Magistrate during the inquiry, and before the order of commitment, it shall quash the commitment, and direct a fresh inquiry by a competent Magistrate.

34. If any Magistrate, not being empowered by law in that behalf, does any of the following things, his proceedings shall be void; that is to say :—

- (1.) If he passes a sentence on proceedings recorded by another Magistrate,
- (2.) If he entertains a case without complaint,
- (3.) If he attaches and sells property under Section 172,
- (4.) If he tries an offender summarily,
- (5.) If he decides an appeal,
- (6.) If he calls for proceedings,
- (7.) If he issues a search-warrant for a letter in the Post Office,
- (8.) If he revises a bail order,
- (9.) If he sells suspicious or stolen property under Section 417,
- (10.) If he demands security to keep the peace,
- (11.) If he discharges recognizances to keep the peace,
- (12.) If he demands security for good behaviour,
- (13.) If he discharges a person lawfully bound to be of good behaviour,
- (14.) If he makes an order in a local nuisance case,
- (15.) If he issues an order to prevent an obstruction,
- (16.) If he prohibits the repetition of a nuisance,
- (17.) If he makes an order in a possession case, or
- (18.) If he makes an order for maintenance.

This and the two preceding sections deal with irregularities. With a view to preventing trials being improperly set aside on account of irregularities not involving a substantial failure of justice, provision has been made in the case of all the most probable irregularities as to what the precise effect of an irregularity shall be. See also Section 283, *post*, paragraph 2.

THE MAGISTRATE OF THE DISTRICT.

35. In every district there shall be a Magistrate of the

Magistrate of the District. first class appointed by the Local Government, who shall be called the Magistrate of the District, and shall exercise throughout his district all the powers of a Magistrate.

This section clearly lays down that there *shall* be in every district a Magistrate of the District, to whom *all other* Magistrates shall be subordinate. The old law called forth many rulings as to the meaning of the term "immediately subordinate," and as matters stood before the passing of this Act, the relation of Magistrates one to the other was not a little confused and intricate.

(445 A, 445 B) 36. In the territories subject to the Lieutenant-Governor of the Punjab and in the territories administered by the Chief Commissioners of Oudh, the Central Provinces and British Burma, in Coorg, and in those parts of the other provinces in which there are Deputy Commissioners or Assistant Commissioners, the Local Government *may invest* the Deputy Commissioner, or other chief officer charged with the executive administration of the district in criminal matters, with power to try as a Magistrate all offences not punishable with death, and to pass *sentence of imprisonment* for a term not exceeding seven years, including such solitary confinement as is authorized by law, *or of fine*, or of whipping, or of any combination of these punishments authorized by law; but any sentence of upwards of three years' imprisonment passed by any such officer shall be subject to the confirmation of the Sessions Judge to whom such Deputy Commissioner is subordinate. Such Sessions Judge may either confirm, modify, or annul any sentence referred for confirmation.

Amendment 3 of 1874.—To Sections 18 and 36, the following words shall be added (namely):—

"or if he think further inquiry or additional evidence upon any point bearing upon the guilt or innocence of the accused person to be necessary, he may direct such inquiry or evidence to be made or taken."

By an oversight evidently, the power of ordering a further inquiry and additional evidence to be taken was omitted under Act X of 1872; this omission has been rectified by Section 3, Act XI of 1874.

The doubt which existed as to whether a Commissioner could direct further inquiry to be made, or additional evidence to be taken, in cases

referred to him for confirmation of sentence passed by a Deputy Commissioner under the old section, is removed.

The provisions of this section were first embodied in Section 1, Act XV of 1862; that section was repealed by Section 2, Act VIII of 1869, the latter enactment adding the provisions of this section to the Code of Criminal Procedure as Section 445A. The provisions of this section were enacted to enable certain officers to try certain cases and pass severer sentence instead of being obliged to commit. These powers have now been somewhat limited by the latter part of this section which subjects the D. C.'s sentence to the confirmation of the Sessions Judge to whom such D. C. is subordinate, and the power given by Section 445B, that of a D. C. trying all cases triable exclusively by a Sessions Court as a Sessions Court has been taken away. Subordinate Magistrates cannot now commit to a D. C. as a Court of Sessions. Referring to Section 314, *post*, it is to be noted that a Deputy Commissioner vested with powers under this section cannot exercise these powers in the case of a person convicted at one trial for two or more offences, so as to pass a sentence exceeding imprisonment for seven years; for by Section 314, *post*, a Magistrate, *other than* a Magistrate acting under this Section 36, is limited to twice the extent of punishment which he is by his *ordinary jurisdiction* competent to inflict. But a Magistrate acting under this Section 36 can inflict punishment to the extent of the powers granted him by this section. Deputy Commissioners cannot exercise these enhanced powers when passing sentence on cases referred to them by a Subordinate Magistrate under Section 46, *post*, for it is there distinctly stated that the Magistrate to whom the proceedings are submitted shall not exceed the powers *ordinarily* exercisable by him under Section 20, *ante*.

May invest.—Officers invested with powers under this section hold such powers only so long as they are in Chief Executive Charge of the District; if, after losing such charge for a time, they are re-appointed, they must be re-invested with the powers herein referred to.—Ruling of Punjab Court in *R. v. Lehna*.

Sentence of Imprisonment.—An officer invested with powers under this section is competent to pass sentence of seven years' transportation in lieu of imprisonment under Section 59, P. C. IX, W. R. 6; he can also pass an enhanced sentence under Section 75, P. C.; but this latter section does not enable an officer acting under this Section 36 to inflict *a longer sentence* than seven years' imprisonment, *or fine*. The word *fine* is used in this section without qualification, so that the amount may be unlimited.

If the substantive sentence be for a term not exceeding three years, the infliction of a fine also with alternative imprisonment or whipping, or both, does not make the sentence one that requires the confirmation of the S. J. The purport of this section, read with Sections 20 and 309 of the Act, is that the substantive sentence of imprisonment shall not exceed three years without the confirmation of the S. J.,—not that a fine shall not be imposed in addition to the sentence of imprisonment (8 P. R. Cr. J. 4).

SUBORDINATE MAGISTRATES.

(23) 37. The Local Government may appoint as many

Subordinate Magistrates. other persons besides the Magistrate of the District, as it thinks fit, to be Magistrates of the first, second, or third class in the district.

All such Magistrates shall be subordinate to the Magistrate of the District, but neither the Magistrate of the District nor the Subordinate Magistrates shall be subordinate to the Sessions Judge, except to the extent and in the manner provided by this Act. (*Vide* Sections 147, 295, 298, and last paragraph 330, *post.*)

The Local Government shall not have power to direct that any Magistrate may try any offence which Magistrates of his class are not authorized to try, or pass any sentence which Magistrates of his class are not authorized to pass by Section 20.

Proviso.

This section merely limits the powers of interference of the Sessions Court to those expressly given by this Act. The present Act has materially altered the relation of the Sessions Judge to the Magistracy. This section subordinates all the Magistrates in a district to the District Magistrate, but not to the Sessions Judge.

Section 295 gives the Court of Session power to call for the records of any Court subordinate to it for *certain purposes*.

Under the provisions of Act XXXII of 1867, the Governor-General in Council delegated to the Chief Commissioners of Oudh, the Central Provinces, and British Burma, the powers conferred on a Local Government by this section.—Gaz. of India, p. 1223 of 1867; p. 44 of 1868; Home Department, Nos. 3828 and 51.

All such Magistrates, &c.—These words were added to the original Code by Section 4, Act VIII of 1869.

(23 c) 38. The Local Government may, by notification in the official Gazette, prescribe the local limits of the jurisdiction of a Magistrate of the District, and may by such notification from time to time alter such local limits.

Power to determine local jurisdiction of a Magistrate of District.

(23 d) 39. The Local Government may divide any district into divisions, and from time to time alter their limits. All existing divisions of districts which are now usually put under the charge of a Magistrate shall be divisions until their limits are so altered.

Divisions of Districts into divisions.

Existing divisions preserved.

Amendment 4 of 1874.—In Section 39, after the word “limits,” the following words shall be inserted (namely):—

“and may, with the previous sanction of the Governor-General in Council, declare any local area to be a District.”

Local Government (23 H) 40. The Local Government may place any Magistrate of the first or second class in charge of a division of a district.

Such Magistrate shall be called a Magistrate of a Division of a District, and shall exercise the powers conferred on him under this Act (28), or under any law for the time being in force, subject to the control of the Magistrate of the District.

Delegation of power to Magistrate of District.

The Local Government may, if it thinks fit, delegate its powers under this section to the Magistrate of the District.

The Local Government may delegate its powers, &c., by general or special orders. (Vide Section 49, post.)

The jurisdiction of the Magistrate of the District is not ousted or excluded by the jurisdiction of the Magistrate of a division of a district in such division ; their jurisdictions are co-ordinate.

(23 G) 41. Every Magistrate in a division of a district shall be subordinate to the Magistrate of the Division of the District, subject, however, to the general control of the Magistrate of the District.

Subordination of officers to Magistrate of Division of District.

42. The Local Government may confer upon any person all or any of the powers of a Magistrate of the first, second, or third class, in respect to particular offences, or to a particular class or particular classes of offences, or in regard to offences generally, in any part of a district, or in any one or more districts, subject to such Local Government.

Special Magistrates.

Such Magistrates shall be called "Special Magistrates."

Amendment 5 of 1874.—To Section 42, the following clause shall be added (namely) :—

"With the previous sanction of the Governor-General in Council, the Local Government may delegate, with such limitations as it may think proper, to any officer under its control, the power conferred by the first clause of this section."

With this section read Sections 20 and 37, *ante*.

43. In conferring powers under this Act the Local

Mode of conferring powers.

Government may empower persons specially by name, or classes of officials generally by their official titles.

(273) 44. The Magistrate of the District, or any Magistrate of a Division of a District, may make over *any criminal case* taken up by him on suspicion, or brought before him on complaint, or on report by the Police, for *inquiry or trial* to any Magistrate subordinate to him, to be dealt with to the extent of the powers with which the Subordinate Magistrate may have been invested under the provisions hereinbefore contained.

The Magistrate making the reference may, if the case was brought forward on complaint, before such reference, examine the complainant as prescribed in this Act; but if he does not do so, the Magistrate to whom the case is referred, shall proceed as if the complaint had been made to him.

The order of reference shall be recorded in a proceeding, and, if the case has been brought forward on the report of a Police officer, shall be recorded on such report; and all processes issued for causing the attendance of the accused person or the witnesses shall direct them to attend before the Magistrate to whom the case has been referred.

The Magistrate making the reference may, if he thinks proper, retransfer to his own file the case referred under paragraph one of this section, and when he has done so, and not before, may proceed therein.

Amendment 6 of 1874.—In Section 44 and the first paragraph of Section 47, the word “criminal” shall be omitted.

“*Any criminal case*” includes proceedings under Chapters XXXVI to XLI, both inclusive.

For inquiry or trial.—If for *inquiry*, it must be sent to an officer who is not competent to try it (see latter portion of paragraph 1 of this section). The reference for inquiry is, literally, for *an inquiry*, and not for *the case to be inquired into*. The latter means every proceeding preliminary to a trial; this is not what is meant by the term *inquiry* here used in this section; and, moreover, the evidence taken by the subordinate would not be evidence when the case is tried by the Magistrate referring the case subsequent to such reference. (4 M. J. 185, 25 H. C. N. W. P. 1869.) If for *trial*, the case referred must be within the jurisdiction and powers of the subordinate to whom it is referred.

(276) 45. If, in the course of a proceeding before a Magistrate, the evidence appears to him to warrant a presumption that the accused person has been guilty of an offence which such Magistrate is not competent to try,

Procedure of Magistrate in cases beyond his jurisdiction.

Or for which he is not competent to commit the accused person for trial,

He shall stay proceedings *and submit the case to any Magistrate to whom he is subordinate*, or to such other Magistrate, having jurisdiction, as the Magistrate of the District directs.

The Magistrate to whom the case is submitted shall either try the case himself, or refer it to any officer subordinate to him, having jurisdiction; or he may commit the accused person for trial.

In any such case, such Magistrate, or other officer as aforesaid, shall examine the parties and witnesses, and shall proceed in all respects as if no proceedings had been held in any other Court.

But any statement or confession duly made by an accused person in the course of the proceedings before the Magistrate before whom the case was originally brought, shall be admissible as evidence in all subsequent proceedings.

This section is the same as Section 276, Act XXV of 1861, as amended by Act VIII of 1869, only more clearly put, the term "*subordinate*," which raised so many questions, having been omitted, and the relation of Magistrates to the Magistrate of the District having been clearly defined.

By a ruling of the Bombay High Court, it must be noted that if a Subordinate Magistrate takes up a case which he has no power to try, and he refers it or submits to the Magistrate to whom he is subordinate, the latter has no jurisdiction, as no complaint has been made to *him*. (4 Bott. C. R. 34.)

And the distinction between examination and confession is plainly drawn in the last two clauses of this Section 45.

(277, 278) 46. Whenever a Magistrate of the second or third class, having jurisdiction, finds an accused person guilty, and considers that he ought to receive a *more severe punishment* than such Magistrate is competent to adjudge, he may record the finding, and, if sentence has not been passed, may submit his proceedings, and forward the accused person to the Magistrate of the District, or to

Procedure when Magistrate cannot pass sentence sufficiently severe.

the Magistrate of the Division of the District, to whom he is subordinate.

The Magistrate, to whom the proceedings are submitted, may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case; and may summon any further witnesses and take their evidence; and shall pass such judgment, sentence, or order in the case as he deems proper, and as is according to law: Provided that he *shall not exceed the powers ordinarily exercisable by him* under Section 20 of this Act.

The Magistrate who originally dealt with the case may, if he is empowered *to hold inquiries* into cases triable by the Court of Session and *to commit persons to take their trial* before such Court, instead of submitting his proceedings to another Magistrate, commit the accused person for trial before the Court of Session instead of finding him guilty.

Amendment 7 of 1874.—To Section 46, the following illustration shall be added (namely):—

“ Illustration.

“ A Magistrate of the third class, having jurisdiction, finds an accused person guilty, but considers that he ought to receive a more severe punishment than imprisonment for a term of one month, or a fine of fifty rupees. On recording the finding, submitting the proceedings and forwarding the accused to the Magistrate of the District, such Magistrate may pass a sentence on the accused including solitary confinement and whipping.”

The addition made by this section makes it clear that a more severe punishment under this section includes whipping when a case is before a Magistrate of the third class.

(1.) Sections 44 to 46 re-enact Sections 277 to 278 of the old Code. The only circumstances in which a Magistrate can pass sentence on the record of a Subordinate Magistrate are those described in this Section 46. That is to say, a case in which a Subordinate Magistrate having jurisdiction, or, in other words, competent to punish the accused person himself, has found him guilty, but considers the offence to be such as to call for a more severe sentence than he is competent to adjudge, in which case he is to record the finding, and submit his proceedings to the Magistrate to whom he is subordinate, who may, if he see fit, pass sentence upon his record. The Subordinate Magistrate must abstain from passing any sentence himself,—he is merely to find the verdict, and leave the punishment to his superior.

(2.) *A more severe punishment.*—An appeal lies. (See Section 269, *post*.)

The High Court of Calcutta, in their No. 837, dated 18th July, 1867, to the S. J. Beerbhoom, held that the words “*call for a more severe*

punishment" in this section refer to a greater amount of the *same kind* of punishment, and not to a wholly different species of punishment, in respect of which it cannot be said with certainty that it is either a more or less severe punishment (Cr. L., VIII., W. R., p. 15), thus excluding whipping. The practical effect of this ruling was that petty thefts had to be tried by Magistrates of higher powers, or, that, if tried by sub-Magistrates of the second class, the accused in such cases were sentenced to short terms of imprisonment, to the crowding of jails and useless expense to Government, and escaped whipping, which is the most wholesome punishment for such offenders. The J. C. O. says in his Circular Preface to Act X of 1872 :—A more severe punishment under Section 46 may be held to include whipping, when a case is before a Magistrate of the third class; for as by Section 20, a Magistrate of this class is prohibited from passing a sentence of whipping, it is evident that such a sentence is considered more severe than such a Magistrate is competent to adjudge. This is now undoubtedly the law.

(3.) *Shall not exceed, &c.*—In Non-Regulation Provinces Deputy Commissioners must bear in mind that they cannot exercise the enhanced powers conferred on them by Section 36, *ante*, when passing sentence on cases referred under this Section 46, as this latter section distinctly provides that the Magistrate to whom the proceedings are submitted "shall not exceed the powers *ordinarily* exercisable by him under Section 20 of this Act."

(4.) *To hold inquiries . . . to commit persons to take their trial.*—I give here the J. C. C. P.'s Book Circular 13 of 1863,* which draws distinctly the difference between *inquiries* and trials.

* 1. There appears to be much misapprehension regarding the provisions of the Code of Criminal Procedure, which define the manner in which cases can be referred to Subordinate Magistrates, and the extent to which the proceedings of such Magistrates can be made use of in the superior Courts.

2. Very much of the difficulty which Officers seem to find in understanding the law upon this subject arises from neglect to observe the essential difference under the Code of Criminal Procedure, between an *inquiry* and a *trial*. The proceedings on an inquiry are always altogether preliminary; they are undertaken for the purpose of ascertaining the facts; for the discovery and apprehension of offenders; and for bringing accused persons to trial before a competent Court. The trial cannot commence until the inquiry is finished. Inquiries may, according to circumstances, be made by the Police, or by a Magistrate; trials, on the other hand, can only be held by duly constituted Courts of Judicature, and the Code of Criminal Procedure declares by what Court every offence is triable.

3. If the distinction be properly appreciated, there can be no difficulty in understanding the Code of Criminal Procedure. Under Section 44 any criminal case may be referred by the Magistrate of the District for *inquiry* to a Subordinate Magistrate, whether the case be triable by him or not; but a case can only be referred for *trial* to such Magistrate if the offence be triable by him. If the reference be for inquiry only, no examination taken by the Subordinate Magistrate during the inquiry can be admitted as evidence by the superior Magistrate on the trial. The inquiry may be useful in showing to the superior Magistrate what are the facts of the case, and in enabling him to determine what further proceedings are necessary, but this is the only use that he can make of it. No Subordinate Magistrate can, under any circumstances, prepare a case not within his own competency to try, in the manner which was common under the old procedure, when he could record all the evidence and send the case for the decision of his superior Officer.

4. It will be observed that, under Section 46, a Magistrate may, under certain circumstances, pass sentence on an accused person, when the evidence has been taken by a Subordinate Magistrate. But in cases coming under this section the Subordinate Magistrate has

Ordinarily exercisable by him.—It should be distinctly understood that in cases where action is taken under this section the Magistrate of the District is limited to his ordinary powers, and an appeal lies to the Sessions Court.

(36) 47. Magistrates of Districts and Magistrates of Divisions of Districts may respectively withdraw any criminal case from any Magistrate subordinate to them, *and may inquire into or try the case themselves*, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same.

Magistrate may withdraw or refer cases.

Magistrates of Districts may withdraw any criminal appeal from any Subordinate Magistrate who has been authorized to hear appeals from the convictions of Magistrates of the second and third classes, and may refer criminal appeals to any competent Magistrate subordinate to them.

Amendment C of 1874.—In Section 44 and the first paragraph of Section 47, the word “criminal” shall be omitted.

May inquire into and try the case themselves.—The Calcutta High Court in their letter No. 504 of 1864, held that *before* a case was tried the Magistrate herein referred to might withdraw the case; but in instances in which the case had been tried and disposed of the Magistrate had no further authority, but that the Sessions Judge was the proper officer to whom representation should be made; so that *after* a case has been tried the Magistrate cannot act under this section.

48. The Local Government may authorize the Magistrate of the District to withdraw from the Magistrates subordinate to him, whether in charge of divisions of districts or not, either such classes of cases as he thinks proper, or particular classes of cases.

Local Government may empower Magistrates of District to withdraw classes of cases.

jurisdiction; he holds a trial, and not merely an inquiry; he records judicially his finding that the accused person is guilty of the offence established against him; and the evidence has been taken by him on a regular trial, and is consequently admissible as evidence before the superior Court.

5. Such cases are altogether distinct from those referred to in Section 45 of the Code, which provides how the Subordinate Magistrate is to proceed when he finds that the case before him is not one within his competency to try. Since he cannot try the case, it is evidently useless that he should go on taking evidence which cannot afterwards be admitted on the trial, and the law, therefore, provides that in such case he shall stay proceedings and submit the case to the Superior Magistrate. As all the proceedings of the Subordinate Magistrate have been held during an inquiry only it follows that the Officer who afterwards tries the case must proceed in all respects as if no proceedings had been held in any other Court.

6. The procedure is in accordance with that laid down by Section 221, for the guidance of Magistrates in warrant cases.

This section is a rider to the preceding section ; it enables the Local Government to anticipate, by rules framed beforehand, that Mahomedan and Hindu Magistrates shall not be obliged to try classes of cases which it is better they should not have to try.

(66 B) 49. The Magistrate of the District, under the general or special orders of the Local Government, may authorize any Magistrate subordinate to him to entertain complaints arising within certain local limits, and may from time to time vary such orders : Provided that no such Magistrate shall be authorized to entertain any complaint of any offence which he is not competent to try or to commit for trial. (*Vide* note under Section 53, *post*.)

Local Government may authorize Magistrate of District to distribute business by localities.

MAGISTRATES' BENCHES.

50. The Local Government may direct any two or more Magistrates to sit together as a bench, and may invest such bench with the powers of a Magistrate of the first, second, or third class, and direct it to try such cases, or such classes of cases only, and within such limits as it thinks fit.

Power to invest Magistrates sitting as a bench with certain powers.

51. In the absence of any special direction as to the powers of any such bench, it shall have the powers of a Magistrate of the highest class to which any one of its members belongs, and who is present taking part in the proceedings.

Powers exercisable by such bench in absence of special directions.

52. The Magistrate of the District may, subject to the general orders of the Local Government, make rules for the guidance of Magistrates' benches in his district.

Magistrate of the District may frame rules for guidance of benches.

Such rules shall not be inconsistent with the provisions of this Act, and may deal with the following subjects :—

The classes of cases to be tried,
The times and places of sitting,
The constitution of the bench for conducting trials,
The mode of settling differences of opinion which may arise between the Magistrates in session.

53. The Magistrate of the District may, subject to

Magistrate of District may vary or annul rules made under section 52.

the like orders, vary or annul, from time to time, any rules made by himself or by his predecessor under the last preceding section.

Section 49, *ante*, provides that the Magistrate of the District may distribute the business of his district locally, by giving to specified Magistrates the power to entertain complaints in certain areas. The power, however, is to be exercised under the general or special orders of the Local Government; and by the provisions of this and the preceding sections the Magistrate of the District is, practically, a kind of Chief Justice over the Magisterial Courts of his district, making rules for the guidance of benches, &c. &c.

CONTINUANCE AND ALTERATION OF POWERS.

(23 F) 54. The Local Government may vary or cancel any powers with which any person may have been invested under this Act or any enactment hereby repealed.

Powers may be varied or cancelled.

(23 B) 55. When, in consequence of the office of a Magistrate of the District becoming vacant, any officer succeeds temporarily to the chief executive administration of the district in criminal matters, such officer shall, pending the orders of the Local Government, exercise all the ordinary powers and perform all the duties of the Magistrate of the District.

Powers of officer temporarily succeeding to vacancies in office of Magistrate of District.

(23 E) 56. Whenever any person holding an office in the service of Government, who has been invested with any powers, under this Act, or any enactment hereby repealed, in any district, is transferred to an equal or higher office of the same nature within another district, he shall, unless the Local Government otherwise direct, continue to exercise the same powers in the district to which he is so transferred.

Continuance of powers of officers transferred.

This and the two preceding sections were first added to the C. C. P. by Act VIII of 1869, Sections 54 and 56, at the request of the Government of Bombay.

CHAPTER V.

OF PUBLIC PROSECUTIONS.

This chapter deals with the appointment of Public Prosecutors, and defines the conditions on which private individuals may be allowed to conduct prosecutions.

57. The Local Government may, if it thinks proper, appoint officers to be called Public Prosecutors.

From this chapter it appears that the Public Prosecutor is merely an advocate for the prosecution; he cannot command the assistance of the Police in getting up cases for trial. The object to be looked for from such appointments is the greater certainty that will be attained in detecting and punishing crime; a matter in which society at large is concerned. In order, however, for a Public Prosecutor to discharge his duty effectually, he should be allowed to initiate prosecutions, and be able to command the assistance of the Police in getting up a case for trial, and not merely interpose and take up a case after the prisoner has been brought to trial; he ought to be more than merely an advocate for the prosecution—he ought to have a hand in the original identification of the criminal, and also the management of the collection of evidence to be laid before the Court. The prosecution of a criminal in any serious case is not to be looked at as a suit between man and man, but to be treated as a public matter; and whether there shall be a prosecution or no prosecution is a subject for consideration of a public servant appointed for the purpose.

58. Public Prosecutors may be appointed either for a particular case, or for particular classes of cases, or for all cases throughout the whole or any part of any province.

59. Any Court inquiring into or trying any case may permit *any person* to conduct the case as prosecutor; but *no person shall be entitled to do so without such permission*. Any person permitted to prosecute may conduct the prosecution personally or by counsel.

Amendment 8 of 1874.—In Section 59, after the word “Court,” the words “inferior to a Court of Session” shall be inserted.

The introduction of the words “inferior to a Court of Session,” in this section, precludes private persons from acting as prosecutors before a Court of Session, even with the permission of the Court. Such prosecutions must be conducted by one or another of the persons specified in Section 202 of the Code.

With reference to prosecutions before the Court of Session, *vide* Section 235, *post*.

Any person refers chiefly to the complainant, for it is clear from the provisions of this chapter that a criminal trial in India is not like a civil

action ; that the complainant is only a witness ; and that if he does conduct the prosecution, he does so only *by the permission of the Court*.

60. The Public Prosecutor may appear and plead without any written authority before all Courts in which any case under his charge is under inquiry, trial, or appeal ; and if any private person instructs any barrister, attorney, pleader, or vakil to prosecute any person in any case under the charge of the Public Prosecutor, the Public Prosecutor shall have the management of the case, and such other person shall act under his directions.

He may plead in all Courts in cases under his charge.

Barristers, &c., privately instructed to be under his direction.

61. The Public Prosecutor may, with the consent of the Court, withdraw any charge against any person in any case of which he is in charge ; and upon such withdrawal, if it is made whilst the case is under inquiry, the accused person shall be discharged. If it is made when he is under trial, the accused person shall be acquitted.

Effect of withdrawal of charge by Public Prosecutor.

Compare with the provisions of Section 459, *post*.

62. If an appeal is brought in any case in which any person, prosecuted by the Public Prosecutor, has been convicted, notice of such appeal and a copy of the grounds of appeal shall be given to such Public Prosecutor by the Appellate Court, and the Court shall also give him due notice of the time and place at which such appeal is to be heard.

Notice to Public Prosecutor of appeal, in cases prosecuted by him.

The question here treated of in this chapter has been prominently before the House of Commons since 1870, and it has been admitted on all sides that this important reform of the law ought to be undertaken at once.

CHAPTER VI.

THE PLACE OF INQUIRY AND TRIAL.

This chapter deals with the law of venue. Speaking regarding the provisions of this chapter, Mr. Stephens said :—"The existing Act copies the English law on this subject, and, in particular, reproduces the bald exceptions to a vague rule which are characteristic of it. We have attempted in this chapter to state the principles on which these exceptions depend, and have turned the exceptions themselves into illustrations. We have also inserted a provision which, unless I am much mistaken, will effectually prevent the undergrowth of cases upon this matter, which has disfigured English law. We propose that, unless it appears that actual injustice resulted from holding the trial in a wrong place, no effect at all shall follow from it."

And in his general view of the Criminal Law of England, he says :—"The venue of all crimes is local, that is to say, there are certain places at which offences committed within certain districts must be tried. To this rule there are many and intricate exceptions. The rule originated in the ancient system of trial by jury. By degrees the law of venue came into its present form—that of a general rule that offences shall be tried in the county in which they are committed, subject to twenty-six exceptions. All this intricacy is needless, and might be dispensed with. Two considerations only affect the question of the place of trial,—the convenience of the accused, and the payment of the expenses of the county. These being the only objects for which the law of venue can be of use, it might be entirely laid on one side, by enacting that no objection to the venue should be taken after plea, and that the only objection allowed before plea should be that the prisoner is prejudiced in his defence by the venue selected. (S. C. L. E. 189.)

(26) 63. Every offence shall be inquired into, and, if
tried by a Magistrate, shall be tried in the
district in which it was committed. If
tried by a Court of Session, it shall be
tried by that Court of Session to which the Magistrate
commits.

Place for inquiry and
trial of offence.

Magistrates shall ordinarily commit to the Court of Session for the Sessions Division in which the district to which they are appointed is situated; but the Local Government may direct that any cases or class of cases committed in any district may be tried in any Sessions Division.

Explanation.—Offences created by local and special laws may be inquired into and tried in any place where the inquiry or trial might be held under the provisions of those laws or of this Code.

Amendment 9 of 1874.—To the second paragraph of Section 63, the following words shall be added (namely) :—

"Provided that such direction be not repugnant to any direction previously issued under the twenty-fourth and

twenty-fifth of Victoria, cap. 104, Section 15, or under Section 64 of this Code."

Act XI of 1872, an Act to provide for the trial of offences committed in places beyond British India, and for the extradition of criminals, extends the Criminal Law of India to British subjects, European and Native, in Native States; and invests political agents, who are Justices of the Peace and European British subjects, with the powers of a first-class Magistrate. (*Vide* Sections 4 to 8, of Act XI of 1872.) The Act also makes British subjects in British territory, whether European or Native, liable for offences committed by them in Native States, under certain provisos (*vide* Section 9, Act XI of 1872); and by Section 10 it further enacts that the Local Government may direct copies of depositions and exhibits to be received in evidence. The Act does not provide that any Native State is to deliver up a subject at once merely on requisition, on such subject becoming chargeable with an offence in British territory and escaping therefrom; neither does it provide for the giving up of European British subjects in Native States charged with offences committed therein, or in British territory, beyond empowering the political agent to issue a warrant for such offender, and send him for trial before the proper Court.

The first schedule to Act XI of 1872 repeals so much of Act I of 1849 and Act VII of 1854 as were left unrepealed by Act XIV of 1870 and the second schedule to Act XI of 1872 contains the sections of the Indian Penal Code referred to in the last paragraph of Section 11 of the Act XI of 1871.

(35) 64. Whenever it appears to the High Court that such order will promote the ends of justice, or tend to the general convenience of the parties or witnesses, it may direct *the transfer* of any particular criminal case, or appeal, *or class of cases or appeals*, from a Criminal Court subordinate to its authority, to any other such Criminal Court of equal or superior jurisdiction.

Or may order that any offence shall be inquired into or tried in any district or division of a district, other than that in which the offence has been committed, or that it shall be tried before itself. If the High Court withdraws any case from any other Court for trial before itself, it shall observe *the same procedure which that Court would have observed* if the case had not been so withdrawn.

Provided that the orders issued under this section shall not be repugnant to orders issued by the Local Government under the last preceding section.

Amendment 10 of 1874.—In Section 64, the proviso shall be repealed.

The Transfer.—From certain rulings of the Calcutta and Madras High Courts it is to be gathered that a clear case must be made out for the transfer of a case; such as inconvenience to those concerned, or likelihood of injustice being done in the event of withholding its power to make such direction before the High Court will interfere, and put in motion the powers here given to it.

Or Class of Cases or Appeals.—As this section originally stood, the High Court could transfer particular cases from one jurisdiction to another,

but it had not the power to transfer a class of cases occurring in different districts of one province to another Magistrate. By the wording of this section, as it now stands, the High Court is enabled to transfer a class of cases for inquiry or trial in any district or division of a district other than that in which the offence was committed.

The same procedure, &c.—This section provides that if the High Court dispose itself of the transferred case, it “shall observe the same procedure which that Court would have observed if the case had not been so withdrawn.”

Amendment 11 of 1874.—After Section 64, the following Section shall be inserted (namely) :—

“64A. Whenever it appears to the Governor-General in Council that it will promote the ends of justice or tend to the general convenience of parties or witnesses, he may, by notification in the *Gazette of India*, direct the transfer of any particular criminal case or appeal from one High Court to another High Court, or from any Criminal Court subordinate to one High Court to any other Criminal Court of equal or superior jurisdiction subordinate to another High Court.

“And the Court to which such case or appeal is transferred shall deal with the same as if it had been originally instituted in or presented to such Court.”

(27) 65. When a person is accused of the commission of any offence by reason of *anything which has been done, or of anything which has been omitted to be done, and of any consequence which has ensued*, such offence may be inquired into or tried in any district in which any such thing has been done, or omitted to be done, or any such consequence has ensued.

Accused triable in district where act is done, or where consequence ensues.

Illustrations.

(a.) A is wounded in the district of X and dies in district Z. The offence of the culpable homicide of A may be inquired into and tried either in X or Z.

(b.) A is wounded in the district of X, and is, during twenty days, unable to follow his ordinary pursuits in the district Y, where he is being treated. The offence of causing grievous hurt to A may be inquired into and tried either in district X or district Y.

(c.) A is put in fear of injury in district X, and is thereby induced, in the district of Y, to deliver property to the person who put him in fear. The offence of extortion committed on A may be inquired into and tried either in district X or district Y.

Or anything which has been omitted to be done.—These words were added to the original section (27 as amended by Act VIII of 1869) by the present C. C. P.

Act XVIII of 1862, Section 31, contains provisions somewhat similar to this section.

A Magistrate should act under Section 65 and the following sections, solely with reference to the convenience of the public : ordinarily the proper district for the inquiry and trial of offences falling under those sections would be that where the witnesses could, with least inconvenience, attend. In such cases, therefore, the Magistrate to whom the complainant or prosecutor may apply should commence the investigation, and proceed with the inquiry and trial, unless he find, in the course of inquiry, that the case can be more conveniently tried in another district. In the event of the latter contingency, he should suspend further proceedings and place himself in communication with the Magistrate of such other district, recommending that the case be removed to that district. If the Magistrate of this district should concur, but not otherwise, the proceedings and the accused should be forwarded to such other Magistrate, and the prosecutor directed to attend and prosecute his complaint. If the other Magistrate differ from him in his opinion as to the district in which the investigation and trial can be most conveniently held, the first Magistrate should either proceed with the inquiry and trial, or refer the question of venue for the determination of the High Court.—Agra Sudder Court, Circular 21, 1864 ; and in 6 Agra 46, 136, the Court ruled that the terms "*anything which has been done*," mean some act constituting the offence or part of it ; and that the terms "*any consequence which has ensued*," mean some consequence modifying or completing that act.

(28, 31, 31 A) 66. When an act is an offence by reason of its relation to any other act which is also an offence, a charge of the first-mentioned offence may be inquired into and tried either in the district in which it happened, or in the district in which the offence, with which it was so connected, happened.

Place for trial where act is offence by reason of relation to other offence.

Illustrations.

(a.) A charge of abetment may be inquired into and tried either in the district in which the abetment was committed, or in the district in which the offence abetted was committed.

(b.) A charge of receiving or retaining stolen goods may be inquired into and tried either in the district in which the goods were stolen, or in any district in which any of them were at any time dishonestly received or retained.

(c.) A charge of wrongfully concealing a person known to have been kidnapped may be inquired into and tried in the district in which the wrongful concealing, or in the district in which the kidnapping, took place.

(d.) A, B, C, and others, combine together to abet the waging of war against the Queen. Any of the conspirators may be tried in any district in which acts were done by any one of the persons with whom he or they conspired in pursuance of the original concerted plan and with reference to the common object.

(29, 30, 32, 33) 67. When it is uncertain in which of several districts an offence was committed ; or where an offence is com-

Place for inquiry or trial where scene of offence is uncertain.

Or not in one district only. committed partly in one district and partly in another; or

Or offence is continuing. Where the offence is a continuing one, and continues to be committed in more districts than one; or

Or consists of several acts. Where it consists of several acts done in different districts,

It may be inquired into and tried in any one of any such districts.

Illustrations.

(a.) An offence committed on a journey or voyage may be inquired into and tried in any district through which the person by whom the offence was committed, or the person against whom, or the thing in respect of which, the offence was committed, passed in the course of that journey or voyage.

(b.) An offence committed near the boundary between two districts may be inquired into and tried in either.

(c.) A charge of being a thug, or of having belonged to a gang of dacoits, may be inquired into and tried wherever the person charged happens to be when the charge is made.

(d.) A charge of having escaped from custody may be inquired into and tried wherever the person charged happens to be when the charge is made.

(e.) A charge of criminal misappropriation or of criminal breach of trust may be inquired into and tried either in the district in which the property, which is the subject of the offence, was received, or in the district or districts in which the whole or any part of it has been misappropriated, or where the offence of criminal breach of trust has been wholly or partly committed.

(f.) A steals a buffalo from B in district W, and personally or by his agents conveys the buffalo through districts X and Y into district Z. This is a continuing offence, and A may be tried either in W, X, Y, or Z.

(32) 68. The offence of murder as a thug, dacoity, or dacoity with murder, may be inquired into and tried wherever the person accused may happen to be when arrested, *or in any other district in which he might be tried under any other provision of this Code, or any other law relating to the trial of such offence.*

The words in italics have been added to this section by the present Act. Under the law as it originally stood, the H. C. Calcutta in their 814 of 1865 *held* that the offences specified in this section could be inquired into only in the district in which the accused person is—that is, happens to be when charged or arrested.

(34) 69. Whenever any doubt arises as to the district in which any offence should be inquired into or tried, the High Court, within whose jurisdiction the offender is apprehended, may decide in which district the offence shall be inquired into or tried.

High Court to decide, in case of doubt, district where inquiry shall take place.

70. No sentence or order of any Criminal Court shall be liable to be set aside merely on the ground that the investigation, inquiry, or trial was held in a wrong district or Sessions division, unless it is proved or appears that the accused person was actually prejudiced in his defence, or the prosecutor in his prosecution, by such error; in either of which cases a new trial may be ordered.

Effect on sentence, of holding investigation, inquiry, or trial in wrong district.

CHAPTER VII.

OF CRIMINAL JURISDICTION OVER EUROPEAN BRITISH SUBJECTS.

The provisions of this chapter are new. It was necessary to remedy the state of things with respect to Europeans in the Mofussil, and that the remedy should be as effectual as it could be consistently with security and justice. It must be borne in mind that the privilege as to the jurisdiction laid down by this chapter was the privilege of the prisoner, not the privilege of the Judge, and so by the provisions of Section 72 it has been provided that only an E. B. S. can inquire into or try an E. B. S. Her Majesty's Commissioners, in their Seventh Report, p. 5, say "they concur with the Commission which framed the Code of Criminal Procedure, in thinking it desirable that a general and uniform system of Criminal Procedure should be applied to persons of all classes without distinction."

In this matter of the E. B. S., the present Code advanced a step towards a general and uniform system to be applied to all persons without distinction. By some it was considered that, in requiring the Judges and Magistrates, by whom Europeans are tried, to be themselves Europeans, too much was conceded to the feelings of Europeans. By others it was urged

that, in empowering first-class Magistrates, being also Europeans and Justices of the Peace, to inflict upon Europeans three months' imprisonment, too great a concession is made to the opposite view of the subject. This Chapter VII was the result of a compromise, "a matter of more or less give-and-take." If there is one innovation in the present Act which is stronger against attack than another, it is this. Every alteration in the law henceforth must be in the direction of making the law alike supreme over all Her Majesty's subjects.

"European British subjects."
71. The expression "European British subjects" means in this Act—

- (1.) All subjects of Her Majesty born, *naturalized*, or *domiciled* in the United Kingdom of Great Britain and Ireland, or in any of the European, American, or Australian Colonies or Possessions of Her Majesty, or in the Colony of New Zealand, or in the Colony of the Cape of Good Hope or Natal.
- (2.) The children and grandchildren of any such person by legitimate descent.

Naturalization, investing aliens with the privileges of native subjects, which can only be effected—(1) by Act of Parliament, or (2) by Certificate of a Secretary of State. The Act of Naturalization has a retrospective effect, in which it differs from denization.

Under certain circumstances a European British subject can forfeit his privilege to be tried as such. (*Vide* Act XXI of 1869, Sections 5, 22, 23, and 30.)

Domiciled.—By the term "domicile," in its ordinary acceptation, is meant where a person lives or has his home. In a strict and legal sense, that is properly the domicile of a person where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has an *animus revertendi*. Two things must concur to constitute domicile: (1) Residence; (2) The intention of making it the home of the party. There must be the fact and the intent; for, as Pothier observes, a person cannot establish a domicile in a place except it be *animo et facto*. Domicile is of three sorts: (1) Domicile by birth; (2) Domicile by choice; and (3) Domicile by operation of law. (W. L. L. 317.) By marriage a woman's domicile of origin is destroyed for ever, and merged in that of her husband. Neither divorce nor her husband's decease can remit her to it. A wife living apart from her husband under a deed of separation will not acquire a new domicile in the country in which she resides (*Warrender v. Warrender*, 9 Bligh, 89, 106), nor will a judicial separation make the wife lose the husband's domicile (*Dolphin v. Robins*, 7 H. L. Cas. 390).

72. No Magistrate, or Justice of the Peace, or Sessions

Officers who may inquire into and try offences committed by European British subjects. Judge shall have jurisdiction to inquire into a complaint, or try a charge, against a European British subject, unless he is himself a European British subject.

No Magistrate shall have such jurisdiction unless he is a Magistrate of the first class and a Justice of the Peace.

No Justice of the Peace shall have such jurisdiction unless he is a Magistrate of the first class.

The Act under which Justices of the Peace are appointed is Act II of 1869. In England, upon a name being added to the Commission of the Peace of a county, the nominee does not *ipso facto* become a Magistrate, but has to qualify at the Quarter Sessions by taking certain oaths; and as the Act relative to qualification, 18 Geo. II., c. 20, did not authorize any one to administer the oaths, it has always been necessary to obtain authority from the Crown by a writ of *dedimus potestatem*.

(40, 40 A) 73. Any Magistrate who is authorized by law to entertain complaints, may entertain against European British subjects such complaints as he is authorized to entertain in the case of other persons.

If he issues any process for the purpose of compelling the appearance of a European British subject accused of such offence, such process must be returnable before a Magistrate competent to inquire into or try the case.

Magistrates of the first class, being European British subjects, and Justices of the Peace, may inquire into complaints against European British subjects. (37, 39, 42) 74. Any competent Magistrate may inquire into complaints of any offence made against a European British subject.

If the offence complained of is a Magistrate's case, and can, in the opinion of such Magistrate, be adequately punished by him, he shall proceed as is hereinafter in this Code directed, according to the nature of the offence; and, on conviction, may pass on such European British subject any sentence warranted by law, not exceeding three months' imprisonment, or fine up to one thousand rupees, or both. (Vide Section 274, *post*, last paragraph.)

75. When the offence complained of cannot, in the

When commitment is to be to Court of Session. opinion of such Magistrate, be adequately punished by him, and is not punishable with death, or with transportation for life, such Magistrate shall, if he thinks that the accused person ought to be committed, commit him to the Court of Session.

When the offence complained of is punishable with death or transportation for life, the commitment shall be to the High Court.

Amendment 12 of 1874.—For the second paragraph of Section 75, the following shall be substituted (namely):—

“When the offence, or one of the offences, complained of is punishable with death or transportation for life, the commitment shall be to the High Court.

“And where any person so committed is charged with several offences, of which one is punishable with death or transportation and the other with a less punishment, and the High Court considers that he should not be tried for the offence punishable with death or transportation, the High Court may nevertheless try him for the other offence.”

For further procedure *vide* Sections 196 and 197, *post*.

76. Sessions Judges or Additional Sessions Judges, and, *when specially empowered in that behalf by the Local Government, Assistant Sessions Judges who are European British subjects, and who have been Assistant Sessions Judges for not less than three years*, may pass on European British subjects any sentence warranted by law, not exceeding one year's imprisonment, or fine, or both.

If at any stage of the proceedings the Sessions Judge thinks the offence cannot be adequately punished by such a sentence, he shall record his opinion to that effect and transfer the case to the High Court. The Sessions Judge may either himself bind over, or direct the committing Magistrate to bind over, the complainant and witnesses to appear before such High Court. (*Vide* Sections 79 and 274, *post*.)

When Sessions Judge finds his powers inadequate.

77. If the Sessions Judge of the Sessions Division

Procedure when Sessions Judge is not a European British subject.

within which the offence is ordinarily triable, is not a European British subject, the case shall be reported, by the committing Magistrate, for the orders of the

High Court.

Mode of conducting trials by Court of Sessions.

78. Trials of European British subjects before the Court of Session shall be conducted according to the provisions of Chapter XIX.

In trials with assessors *not less than half the number of assessors*, and in trials by jury *not less than half the number of jurors*, shall be European British subjects.

Not less than half the number, &c.—To obtain this number, the Judge is allowed to summon persons who could in other trials claim exemption.—(See Section 406, *post*.)

(410) 79. Any European British subject who is convicted by a competent Magistrate of any offence, may appeal either to the Court of Session or to the High Court.

Appeal from conviction of such subject by Magistrate.

Appeal from conviction by Court of Session.

80. Any European British subject who is convicted of any offence by any Court of Session, may appeal to the High Court.

81. Any European British subject who is detained in custody by any person, and who considers such detention unlawful, may apply to the High Court, which would have jurisdiction over him in respect of any offence committed by him at the place where he is detained, or to which he would be entitled to appeal from any conviction for any such offence, for an order directing the person detaining him to bring him before the said High Court to abide such further order as may be made by it.

Right of European British subject under detention to apply for order to produce his person.

Procedure on such application.

The High Court, if it thinks fit, may, before issuing such order, inquire on affidavit or otherwise, into the grounds on which it is applied for, and grant or refuse such application; or it may issue the order in the first instance, and when the person applying for it is brought before it, it may make such further order in the case as it thinks fit, after such inquiry as it thinks necessary.

The High Courts may issue such orders throughout the

territories over which they have jurisdiction and over such other places as the Governor-General in Council may direct.

This section is a substitute for a writ of *habeas corpus*.

For the original criminal jurisdiction of the High Courts over European British subjects, or rather the extension of the original criminal jurisdiction, *vide Gazette of India*, page 36, for the year 1867.

82. Neither the High Courts nor any Judge of such High Courts shall issue any writ of *habeas corpus*, mainprise, *de homine replegiando*, nor any other writ of the like nature, beyond the Presidency towns.

Power of High Courts as to issue of writs.

With reference to Sections 81 and 82, Mr. Stephens, in introducing the Report of the Select Committees on the C. C. P. Bill for approval said: "I must just notice the provisions of Sections 81 and 82 on the subject of the writ of *habeas corpus*. The matter is at present in the greatest confusion, as any one may see for himself by reading the arguments on the subject which took place in the case of the Wahábi convict Amír Khán. I will not detain the Council with a legal argument; but I think it is exceedingly doubtful whether the writ of *habeas corpus* would issue, as matters now stand, to bring up a European unlawfully detained in custody in the Mofussil, and I think it pretty clear that it would not lie to bring up a Native unlawfully detained by a Native in the Mofussil. Into the minor ramifications of the subject, I need not enter. The sections in the Bill make the matter clear. An order equivalent to a writ of *habeas corpus ad subjiciendum* may be issued in respect of European British subjects throughout the whole of India. The writ of *habeas corpus* itself will continue to be issued, as at present, in Presidency towns, but nowhere else.

"It must not be supposed that personal liberty is at all unprotected in the Mofussil. Wrongful restraint (which is very widely defined) is an offence against the Penal Code. And a person subjected to wrongful restraint can always procure his release by presenting a petition to any Magistrate for a summons or warrant against the person who wrongfully restrains him, and by procuring himself to be summoned as a witness. These remarks exhaust all I have to say on the general part of the Bill."

The law in England as to *habeas corpus* is, shortly, that any person detained in custody may obtain from any of the Superior Courts at Westminster, whether sitting or not, upon affidavit showing facts *prima facie* inconsistent with legal detention, a writ called "*habeas corpus ad subjiciendum*," requiring the person detaining him to produce the body of the prisoner, specifying the day and cause of his detention; whereupon the Court will consider whether the return shows any legal cause of detainer, and if not, will order his immediate release. As the law now stands, no person can, under any circumstances, be legally detained beyond the second term or Session after his commitment (B. C. L.—*Darnel's case*).

83. When any person claims to be dealt with as a European British subject, he shall state the grounds of such claim to the Magistrate before whom he is brought for the purposes of the inquiry or trial; and such Magistrate shall, on such statement, decide whether he is or is not a European British subject, and shall deal with him accordingly; and if any such person is dissatisfied with such decision, the burden of proving that it was wrong shall be upon him. If the Magistrate decide that the

Procedure on claim of European British subject to be dealt with as such.

accused person is not a European British subject, the trial shall proceed, but such decision shall form a ground of appeal.

Where there is reason to believe that an accused is a European British subject, he must be allowed an opportunity of pleading that he is one (5 W. R., 53). Before the Magistrate commits a European British subject to the High Court, he must ascertain, to his own satisfaction, that the accused is a European British subject. The mere plea or allegation of an accused that he is a European British subject, is not sufficient to oust the Magistrate's jurisdiction over the accused, if the Magistrate has cause to disbelieve such statement; but if the Magistrate has no cause to distrust the accused's statement, such statement may be acted on. If the Magistrate is positive on this point, and knows the accused to be a European British subject, he cannot deal with the case, except as a Justice of the Peace, whether the prisoner claims or does not claim to be dealt with as such.

84. If a European British subject does not claim to be dealt with as such before the Magistrate before whom he is tried or committed, he shall be held to have waived his privilege as such European British subject.

If the Magistrate has reason to believe that any person brought before him is a European British subject, it is his duty to ask him whether he is one or not.

(Vide note under preceding section.)

85. If a person, who is not a European British subject, is dealt with as such and does not object, the proceedings shall be valid.

86. All High Courts shall deal with proceedings against European British subjects outside of the Presidency towns in the manner in which they are empowered by this Act, or by any other law in force for the time being, to deal with the proceedings of Magistrates outside the Presidency towns; and not according to the law of England relating to the dealings of the superior Courts in England with the proceedings of Justices of the Peace in England.

The High Courts shall have the same powers with respect to the inquiries and charges against European British subjects as Courts of Session have with respect to inquiries and charges against other persons.

87. All Magistrates and Courts of Session, proceeding against European British subjects under this chapter, shall proceed

Trial of person not a European British subject under this chapter.

Procedure of High Courts.

Proceedings against European British subjects to be regulated by this Act.

under the provisions of this Act, and not according to the law of England relating to Justices of the Peace; and all the provisions of this Act, not inconsistent with the provisions of this chapter, shall apply to such proceedings.

88. European British subjects sentenced to imprisonment shall be confined in such places as the Local Government may either specially or generally appoint.

PART III.

OF THE POLICE.

CHAPTER VIII.

OFFENCES OF WHICH INFORMATION MUST BE GIVEN TO POLICE, AND DUTY OF THE PUBLIC.

(138) 89. Every person aware of the commission of any offence made punishable under Sections 121, 121A, 122, 123, 124, 124A, 125, 126, 130, 302, 303, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 456, 457, 458, 459, or 460 of the Indian Penal Code, shall in the absence of reasonable excuse, the burthen of proving which shall lie upon such person, give information of the same to the nearest Police Officer or Magistrate.

This chapter deals with the earliest stage of criminal proceeding,—that which is left in the hands of the Police. The power of asking questions and requiring answers in the collection of evidence by the Police has been extended, and the manner and form in which the present Act is drawn up makes the distinction between the Magistrate's functions and the functions of the Police far more clear than did the original C. C. P. With reference to the several Police Acts for the different Presidencies, Mr. Stephens remarked "that there may be some degree of awkwardness in leaving the organization of the Force to be provided for by Act V of 1861, and other corresponding Acts which apply to different provinces, and in prescribing the most important of their powers and duties in this Act. No doubt the

Code would be more complete if it contained the Police Acts ; but there are two difficulties in the way which have prevented this arrangement. The first is, that the subject of Police organization is just one of those with which the local legislatures ought to deal. The second is, that very great differences of opinion exist on the subject, with which we are not in a position to deal in reference to the present Bill."

The provisions of this section have been extended by the addition of certain sections of the Penal Code having been inserted ; " Murder " and " Offences against the State " having been added to the list of offences which it is the duty of the public to report. The sections referred to in this Section 89 chiefly bind the public, and apply to the community at large. For special obligations binding owner and occupier of land, see Section 154, P. C., and Section 90, *post*.

90. Every Village Headman, Village Watchman, owner or occupier of land, or the agent of any Landholders and others bound to report certain matters. such owner or occupier, and every Native officer employed in the collection of revenue or rent of land on the part of the Government or the Court of Wards, is bound forthwith to communicate to the nearest Magistrate, or to the officer in charge of the nearest Police-station, any information which he may obtain respecting :—

(a.) The residence of any notorious receiver or vendor of stolen property at the village of which he is headman or watchman, or in which he owns or occupies land, or collects rent or revenue, as the case may be ;

(b.) The resort to any place within the limits of such village of any person or persons known or reasonably suspected of being a thug or robber ;

(c.) The commission or intention to commit suttee or other non-bailable offence at or near such village ;

(d.) The occurrence of any sudden or unnatural death.

This section embodies several provisions of the Bengal Regulations which defined the responsibility of landholders and others for the detection and prevention of local crime.

(82) 91. Every person *is bound to assist* a Magistrate or Police Officer demanding his aid in the prevention of a breach of the peace,
All persons to assist Magistrate and Police in certain cases.

Or in the suppression of a riot or an affray,

Or in the taking of any other person whom such Magistrate or Police Officer is authorized to arrest.

Is bound to assist.—Intentional omission to give assistance is punishable under Section 187, I. P. C.

CHAPTER IX.

OF ARREST WITHOUT WARRANT.

(100) 92. A Police Officer may, without orders from
When Police may a Magistrate and without a warrant,
arrest without warrant. arrest :—

Firstly.—Any person who in the sight of such Police Officer commits a cognizable offence.

Secondly.—Any person against whom a reasonable complaint has been made or a reasonable suspicion exists of his having been concerned in any such offence.

Thirdly.—Any person against whom a hue and cry has been raised of his having been concerned in any such offence.

Fourthly.—Any person who has been proclaimed either under this Act, or in a district or Police Gazette, or notification.

Fifthly.—Any person found with property in his possession which may reasonably be suspected to be stolen property.

Sixthly.—Any person who obstructs a Police Officer while in the execution of his duty, or who escapes from lawful custody ; and

Seventhly.—Any person reasonably suspected of being a deserter from Her Majesty's Army or Her Majesty's Indian Army.

It is optional to the Police Officer to arrest. Under the circumstances set forth in this section, he is bound to exercise his reason and to act with discretion ; for, should he be mistaken, he will not be exonerated, unless he has acted in good faith and with due care. To arrest and leave it to the fates for evidence to turn up, is undoubtedly illegal.

Under the Police Act V of 1861, a Police Officer may take into custody without a warrant any person committing any of the following offences : but such offence must have been committed *within his, the Police Officer's view*. Any wilful excess of a Police Officer of his legal powers of arrest is punishable under Section 220, I. P. C.

Any person who, on any road or in any street or thoroughfare, within the limits of any town to which this section shall be especially extended

by the Local Government, commits any of the following offences to the obstruction, inconvenience, annoyance, riot, danger, or damage of the residents and passengers, shall, on conviction before a Magistrate, be liable to a fine not exceeding fifty rupees, or to imprisonment not exceeding eight days; and it shall be lawful for any Police Officer to take into custody, without a warrant, any person who, within his view, commits any of such offences, namely:—

First.—Any person who slaughters any cattle, or cleans any carcass; any person who rides or drives any cattle recklessly or furiously, or trains or breaks any horse or other cattle.

Second.—Any person who wantonly or cruelly beats, abuses, or tortures any animal.

Third.—Any person who keeps any cattle or conveyance of any kind standing longer than is required loading or unloading, or for taking up or setting down passengers, or who leaves any conveyance in such manner as to cause inconvenience or danger to the public.

Fourth.—Any person who exposes any goods for sale.

Fifth.—Any person who throws or lays down any dirt, filth, rubbish, or any stones or building materials, or who constructs any cow-shed, stable, or the like, or who causes any offensive matter to run from any house, factory, dung-heap, or the like.

Sixth.—Any person who is found drunk or riotous, or who is incapable of taking care of himself.

Seventh.—Any person who wilfully and indecently exposes his person or any offensive deformity or disease, or commits nuisance by easing himself, or by bathing or washing in any tank or reservoir not being a place set apart for that purpose.

Eighth.—Any person who neglects to fence in or duly to protect any well, tank, or other dangerous place or structure. (Act V of 1861, Sec. 34.)

(108) 93. Any person known to have committed or suspected of having committed an offence for which a Police Officer is not authorized to arrest without a warrant, *and who refuses, on demand of a Police Officer, to give his name and residence,*

Or gives a name or residence which there is reason to believe to be false,

May be detained by such Police Officer for the purpose of ascertaining the name or residence of such person; and shall, within twenty-four hours, be forwarded to the Magistrate having jurisdiction, unless before that time his true name and residence are ascertained, in which case such person shall be forthwith released.

Who refuses, on demand, to give his name and residence.—This is the only case in which the Police can make any inquiry into an offence other than

the offence for which he is empowered to arrest without a warrant, and in this case only so far as is laid down in this section.

(101) 94. An officer in charge of a Police-station may, without orders from a Magistrate and without a warrant, arrest or cause to be arrested (102) any person found lurking within the limits of such station who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself,

Or any person who is a reputed robber, house-breaker, thief, receiver of stolen property knowing it to be stolen,

Or who is of notoriously bad livelihood.

The remarks of the High Court, N. W. P. *in re* Baboo Dutter Lal *v.* Captain Horsford, as to how registers should be kept, are here given for the benefit of Police Officers, with reference to the legitimate use which may be made of the Budmash list kept by Police Officers.

For the protection of the public, it has been found necessary in every civilized State to constitute certain persons officers for the prevention and detection of crime, and to render them efficient it has also been found necessary to confer on them powers of interfering with the liberties of their fellow-citizens, which, if exercised by private persons, would render them liable to civil proceedings. It is necessary for the efficiency of the police that they should possess information of the names of persons who are likely to commit offences; and inasmuch as changes must of necessity constantly take place in the members who constitute the police force, it is also necessary that the information above mentioned should be preserved. To effect this, registers are ordinarily kept, showing the names of persons who have committed, or who on strong grounds are suspected of the commission of, offences. Such a register, accurately compiled and strictly reserved for the purpose for which it is designed—the private use of the police—may be of great advantage to the public in enabling the police to perform their duties effectually. But if this register be a public register, or if the persons having the custody of it allow its contents to be matter of public conversation, we can imagine no greater engine of injustice and oppression. The matter recorded is not confined to facts which have been ascertained by fair and open investigation in Courts of Justice. It does, and necessarily must in a great measure, consist of the results of *ex-parte* investigations made in private by the police. It is, and necessarily must be, in great part the fruit of rumour and suspicion, and sometimes, it may be, of malice. Were it permitted that such a register should be kept as a register to which the public might have access, or of which the entries were bruited about, the characters of honest men might be blasted, without redress, through the instrumentality of any enemy who could gain the ear or excite the suspicions of the police. Very shortly after the establishment of this Court, the abuse of the register was on more than one occasion prominently brought to its notice. It had at that time (and we fear the evil has not even yet been cured) come to be regarded as a public register, and Magistrates not unfrequently passed

orders directing the entry of a person's name as a kind of punishment. The Court on the 9th August, 1866, addressed the Government of these Provinces on the subject, and pointed out the probabilities and magnitude of the evils of which we have above made mention, and the Government promptly passed an order that entries should only be made by the District Superintendent, or the Magistrate, *in his capacity of Superintendent of Police*, and directed that the register should be considered a *private register*, and should only be open to inspection by officers of police. In the present case, had the orders of Government been obeyed in spirit as well as in letter, although the plaintiffs might have been unjustly recorded, they would not have been greatly damnified; but no sooner was the entry made, than it became known that it had been made."

(102) 95. Every Police Officer shall prevent, and may interpose for the purpose of preventing, the commission of any cognizable offence.

Police to prevent certain offences.

(103) 96. Every Police Officer receiving information of a design to commit any such offence, *shall communicate such information* to the Police Officer to whom he is subordinate, and to any other officer whom it may concern to prevent or take cognizance of the commission of any such offence.

Information of design to commit such offences.

Shall communicate such information.—Omission to give the information required by this section, if simple omission, is punishable under Section 176, I. P. C., but should the intention by the party by such omission be to defeat the ends of justice, he is punishable under Section 119, I. P. C.

(104) 97. A Police Officer knowing of a design to commit any such offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if the commission of the offence cannot be otherwise prevented.

Arrest to prevent such offences.

(105) 98. A Police Officer may, of his own authority, interpose for the prevention of any injury attempted to be committed in his view to any public property, movable or immovable,

Injury to public property.

Or to prevent the removal or injury of any public landmark, or buoy, or other mark used for navigation. If necessary, such Police Officer may detain the person doing such injury according to the provisions of Section 93.

Any of these acts, if committed, are punishable under one or other of the Sections 430 to 434, I. P. C.

(106) 99. If there is reason to believe that any person,

Ingress to be allowed into house entered by person of whom Police are in search.

liable to arrest under this chapter without a warrant, of whom a Police Officer is in search, has entered into or is within any house or place, it shall be the duty of the person residing in or in charge of such house or place, on the demand of such Police Officer, *to allow ingress thereto*, and all reasonable facilities for a search therein.

To allow ingress thereto.—The intentional offering of any resistance or illegal obstruction to lawful apprehension for any offence punishable under P. C., is punishable under provisions of Section 224. Voluntarily obstructing a Police Officer in discharge of his public functions is punishable under Section 186, P. C. To threaten a Police Officer for the purpose of inducing him to forbear to do any act committed in the exercise of his public duty is punishable under Section 189. See Sections 332, 333, 353, P. C., in which punishment is provided for offenders doing certain acts against person of Police Officer in discharge of his police functions.

(107) 100. If ingress to such house or place cannot be obtained under Section 99, the Police Officer authorized to make the arrest shall take such precautions as may be necessary to prevent the escape of the person to be arrested, and send immediate information to any Magistrate having jurisdiction.

Procedure where ingress not obtainable.

If a warrant cannot be obtained without affording such person an opportunity of escape, and there is no *person authorized to enter without a warrant* on the spot, the Police Officer may make an entry into such house or place and search therein.

Person authorized to enter without a warrant.—When re-enacting the Code, this point might have been cleared up. At present this individual is an unknown quantity, except by implication, for he is nowhere defined : probably it includes all who may issue warrants.

(109) 101. A Police Officer making an arrest under this chapter shall, without unnecessary delay, take or send the person arrested before the Magistrate having jurisdiction in the case, or before the officer in charge of a Police-station.

Person arrested to be taken before Magistrate or officer in charge of Police-station.

Merely reading this section by itself would lead one to suppose that it was discretionary with the Police Officer to send the arrested person either to the Magistrate *or* the officer in charge of the Police-station ; but this

is not so, of course. This section must be read with Chapter VI *ante*, and Section 103 *post*, and then it will be clear that the accused or suspected party is to be sent (1) to the Magistrate *without unnecessary delay* if the case is ready to be proceeded with to trial, and if not, *then* (2) to the officer in charge of the Police-station.

(140) 102. When any officer in charge of a Police-station requires any officer subordinate to him to arrest without a warrant (otherwise than in his presence) any person who may lawfully be arrested by such officer without a warrant, he shall deliver to the Police Officer required to make the arrest, an order in writing, specifying the person to be arrested, and the offence for which the arrest is to be made.

The provisions of Sections 91 and 176 to 182 (both inclusive) shall apply to every order in writing issued under this section.

(141) 103. For the purpose of arresting any person accused of a cognizable offence, a Police Officer may pursue any such person into the limits of the local jurisdiction of another Police Officer, whether subordinate to the same Magistrate as himself, or to the Magistrate of any other district, and whether such place be in the same Province or not.

(206) 104. Any person attending a Criminal Court, although not upon an arrest or summons on a complaint made, may be detained by such Court for the purpose of examination, for any offence which from the evidence he may appear to have committed, and may be proceeded against as though he had been arrested or summoned on a complaint made.

When the detention takes place in the course of an inquiry under Chapter XV, or after a trial has been begun, the proceedings in respect of such person shall be commenced afresh and the witnesses reheard.

This section applies to every Court carrying on a judicial proceeding. It is as well to note this, as, under the old law, the provisions of this section were applicable to preliminary inquiries, and not to cases where the *trial* was going on.

OF ARREST BY PRIVATE PERSONS.

105. Any private person may arrest any person who, in his view, commits a non-bailable and cognizable offence.

Arrest by private persons.

This section empowers private individuals to arrest, in non-bailable cases, for offences for which a Police Officer could arrest without warrant when committed in his sight; a power which practically existed before the passing of the present Act, but had not been distinctly conferred by law, as it now is.

106. The master or mate of a British merchant ship may, either with or without the assistance of the Police, who are bound to aid if so required by such master or mate, arrest seamen or apprentices duly engaged, under the Statute 17 & 18 Vic., c. 104, or other law for the time being in force relating to merchant shipping, who refuse to join, or desert from the vessel in which they contracted to serve.

Arrest of deserters from British ships.

Such arrest shall only be made at the request and on the responsibility of such master or mate, and he shall be required by the Police to accompany the arrested person, should he be apprehended, before the Magistrate having jurisdiction; and it shall be the duty of such master or mate to obey such requisition.

107. A private person making an arrest under this chapter shall forthwith make over the person arrested to a Police Officer, and in absence of a Police Officer shall take such person to the nearest Police-station. The Police shall deal with such person according to the provisions of Section 92 or 93, as the case may be, and shall not arrest or detain him unless he appears to be liable to arrest or detention under the section applicable.

How to proceed with person arrested.

(110) 108. When any offence is committed in the presence of a Magistrate, he may order any person to arrest the offender, and may thereupon commit him to custody, or if the offence is bailable, may admit him to bail. (*Vide* Form C, Schedule II.)

Offence committed in Magistrate's presence.

CHAPTER X.

POWERS OF THE POLICE TO INVESTIGATE.

It should be borne in mind that the terms "Magistrate having jurisdiction" used in this chapter, refer invariably to a Magistrate empowered to receive reports from the Police, and complaints, and who has power to try or commit the accused for trial.

(133) 109. An officer in charge of a Police-station may, without order of a Magistrate, investigate any offence cognizable (4) by the Police.

What offences Police
Officers may investigate.

(133) 110. A Police Officer may not, without the order of a Magistrate of the first or second class, investigate an offence not cognizable (4) by the Police.

What offences Police
may not investigate.

A Magistrate of the first or second class may, as provided in Sections 24 and 26, order the Police to investigate; and on receipt of an order to investigate a non-cognizable case, a Police Officer *may exercise the same powers in respect of the investigation* as in a cognizable case.

A Police Officer is bound under this section to make an inquiry into any offence punishable by the I. P. C. or any special or local law, when ordered by a Magistrate, whether the offence be cognizable or not by the Police; and he may exercise the same powers in respect of the *investigation*. This term "investigation" should be carefully noted, as also the legal definition of this term given in Section 4, *ante*, viz., "all the proceedings by the Police, authorized by this Act, for the collection of evidence."

(134) 111. Nothing in Section 110 shall be held to interfere with the exercise of any powers vested in a Police Officer *by any special or local law*, or with the performance of any duty which is imposed upon a Police Officer by any such special or local law.

Saving of powers
vested in Police by
special or local law.

By any Special or Local Law.—By Section 34, Act V of 1861, the Police have powers to arrest persons in certain cases (for said cases see Section 34, Act V of 1861). It must be borne in mind that by said obstructions, inconvenience, annoyance, risk, danger, or damage must be committed, on any *road* or in any *street*, or *thoroughfare* of any *town* to which this

Section (34) shall be especially extended by the Local Government ; and further, the eight offences specified in that section must be committed within the view of Police Officer so arresting without warrant.

(139) 112. Every complaint preferred to an officer in charge of Police-station shall be *reduced into writing*, and shall be signed, sealed, or marked by the person making it ; and *the substance thereof shall be entered* in a book to be kept by such officer in the form prescribed by the Local Government.

Complaint to Police
to be in writing.

The complaint herein referred to may be preferred in writing, and, if written, may, by Act VII of 1870, Section 19, Clause 16, be on plain paper.

Reduced into writing.—Neither a Judge nor a Magistrate can order that, as a general rule, a complaint which the Police are required by this section to reduce to writing, should be retained as part of the judicial record of the investigation before the Magistrate. The substance of the complaint is to be entered in the Police Officer's diary, which the Magistrate can call for and inspect. The complaint is not made on oath, and perjury could not be assigned upon it, but it might be the ground of proceedings under Section 182 or 211, I. P. C., and the record of it would be more conveniently retained in the custody of the Police Officer than filed in the Magistrate's office. (*Vide* notes to Section 211, I. P. C.)

"Every complaint preferred to an officer in charge of a Police-station to be reduced into writing, and the substance thereof to be entered in a book to be kept by such officer," as provided by this section, appears to comprehend two distinct records, the former of which may be called for and made use of by the Magistrate or other Judicial Officer trying the case to which the record relates ; whilst of the other, judicial cognizance can be taken only so far as the matter of inquiry affects the conduct of the Police Officer who prepared the record.

The first record should simply contain the plain statement or deposition of the person making complaint, or giving information to the Police Officer, without any additional matter elicited by interrogation or comment on the part of the officer receiving the complaint, and there is nothing in the law to prevent such complaint or statement being brought to the Police-station in written form. The law requires that, before action is taken upon the complaint, it shall be placed upon record either by complainant himself or by the officer before whom the complaint is lodged.

That judicial cognizance may be taken of this record in the trial of the case to which it refers is plainly to be inferred from the absence of any proviso to the contrary ; for it will be observed that the section of the Criminal Procedure Code, which empowers the Police Officer engaged in the investigation of a case to reduce into writing the statement made by any person examined by him in the course of such inquiry, expressly provides that such written statement shall not be used as evidence. (*Vide* Section 119, *post*.)

The second record provided by this section is purely for police purposes,

for the information of the superior officers of Police, and the future guidance of the officer in charge of the Police-station. This, as other subjects of record in Police Diary, are expressly declared to be excluded from judicial cognizance, except in so far as the subject of inquiry relates to the conduct of the Police Officer in connection with the case to which this record has reference. (Circular No. 1163, June 27th, 1864, p. 301, vol. IV, R. J. P. J.)

The book kept under this section is a diary, and so is the book kept under Section 126, *post*; but there is this difference between these two diaries. The diary under Section 126, *post*, is a special diary, to be kept by a Police Officer while making an inquiry, but is not evidence of any facts it contains except against the Police Officer who made it. The diary kept under this section is known as the Station Diary or Roznamcha: it contains every complaint preferred to an officer in charge of a Police-station. The entries in this diary are *prima facie* proof that such complaint as is therein contained was actually made and recorded, though of course it proves nothing as to the truth or falsity of such information.

The words "and shall be signed, sealed, or marked by the person making it" have been added to this section by the present C. C. P.

113. If a complaint is preferred to an officer in charge of a Police-station, of the commission within his local jurisdiction of an offence which is not cognizable by the Police, the Police Officer shall enter the substance of it in the station diary, and shall refer the complainant to the Magistrate.

The provisions of this section are new. The original C. C. P. contained no such provision.

(135) 114. If, from information or otherwise, an officer in charge of a Police-station *has reason to suspect the commission within his local jurisdiction of an offence cognizable by the Police, he shall send immediate intimation to the Magistrate having jurisdiction*, and shall proceed in person or shall depute one of his subordinate officers to proceed to the spot to investigate the facts and circumstances of the case, and to take such measures as may be necessary for the discovery and apprehension of the offender.

Police Officers shall investigate offences committed within the local limits of their jurisdiction, but they may investigate offences committed outside of those limits in cases in which a Magistrate might, under the provisions of

Chapter VI, inquire into an offence not committed within his district.

No such proceeding shall at any stage be called in question on the ground that such offence was not committed within such officer's local jurisdiction.

Has reason to suspect, &c.—The words here italicized are most important, and should be well borne in mind by both Magistrates and Police Officers. The Magistrate being responsible for the repression of crime, the law expects him to exercise a vigilant supervision over this branch of his duties. To enable him to do so satisfactorily, the Police are ordered by law to early inform the Magistrate of all cognizable offences, and to keep him constantly informed of every stage subsequent to their first occurrence, and it is the Magistrate's duty to watch closely every step taken by the Police in their subsequent procedure, and aid them with his advice. The way in which the Magistrate keeps himself acquainted with such matters is by daily inspecting the Diaries, and calling for such information as he requires, and passing such orders as he thinks necessary.

This section makes the venue sections of the Code applicable to Police inquiries; so that henceforth the same principles will guide a Magistrate and a Police Officer in determining whether he has jurisdiction to inquire or to investigate.

Reports from the subordinate Police should, in the first place, be sent to their immediate superior, the D. S., whose duty it of course is to report to the Magistrate on all matters which must by law be reported to him, and all reports under this section must be submitted by the D. S., or by any Officer acting for him, to the Magistrate; when, however, the Magistrate is not at the Sudder Station, reports must be sent direct by the Police to the Magistrate, a copy thereof being forwarded to the D. S. In respect to cases occurring in a division of a district, the report should be forwarded, in the first place, to the Officer of Police of the highest rank at the head-quarters of the sub-division, who will at once submit it to the Magistrate having jurisdiction—*i.e.*, the Sub-divisional Assistant or Deputy Magistrate. (Circular Memo. No. 37, April 1st, 1864, p. 251, vol. II, R. J. P. J.)

By the provisions of Section 112, *ante*, the Police Officer is bound to reduce into writing every complaint preferred to him, but he cannot examine the complainant on oath.

(135) 115. Such Magistrate, on receiving intimation of the commission of any such offence, may at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise to dispose of, such case in the manner provided in this Act.

(136) 116. Provided that, when any complaint is made against any person by name, and the case is not of a serious nature, the officer in
Where local investigation dispensed with.

charge of a Police-station need not proceed in person or depute a subordinate officer to make an investigation on the spot, unless such local investigation appears to be necessary.

(137) 117. Provided that, if it appear to the officer in charge of a Police-station that there is no sufficient ground for entering on an investigation, or that the *immediate apprehension of the accused is not necessary for the ends of justice*, he shall not proceed in the case, *but shall report* the substance of the complaint or information for the orders of the Magistrate having jurisdiction. Such report shall be submitted through *such superior officer* of Police as the Local Government shall, by general or special order, in that behalf appoint. Such superior officer may give such instructions to the officer in charge of the Police-station as he deems fit, and shall, after recording such instructions on such report, transmit the papers without delay to the Magistrate having jurisdiction.

Where Police Officer in charge sees no sufficient ground for investigation.

Immediate apprehension of the accused, &c.—It does not necessarily follow that because a Police Officer may arrest without a warrant, that he *must* do so. In all cases the “necessity for arresting” will depend on the nature of the case, whether it be trivial or heinous. The P. O. must use his discretion as to the necessity for arrest.

If there is no sufficient ground for entering on the investigation, or if immediate apprehension is unnecessary, all the Officer in charge of the Police-station has to do is to report for the orders of the Magistrate.

Such superior Officer.—This is not the “Officer in charge of a Police-station,” but a superior officer appointed for the special purpose named in this section “by general or special order of the Local Government.”

(144) 118. An officer in charge of a Police-station, or other officer making an investigation, may, by an order in writing, require the attendance before himself of any person being within the limits of his own *or any adjoining station*, who, from the statement of the complainant or otherwise, appears to be acquainted with the circumstances of any case which such officer is investigating, and such person shall attend as required, and shall answer all questions relating to such case put to him by such officer :

Provided that no person shall be bound to answer any questions tending to criminate himself.

Police Officer's power to summon witnesses.

"*Or adjoining station.*"—These words have been added to the law by the present Act.

Under this section a Police Officer can summon a witness, but he cannot detain him, or compel him to attend; but having once got his attendance, the witness is bound to answer all but criminating questions. (*R. v. Behari Singh*, 7 W. R., 3.)

Disobedience of orders issued under the provisions of this section is punishable under Section 174, I. P. C.

(145) 119. An officer in charge of a Police-station, or other Police Officer making an investigation, may examine *orally* any person supposed to be acquainted with the facts and circumstances of the case, and may reduce into writing any statement made by the person so examined.

Oral examination of witnesses by Police.

Such person shall be bound to answer all questions relating to such case put him by such officer other than questions criminating himself.

No statement so reduced into writing shall be signed by the person making it, nor shall it be treated as part of the record or used as evidence.

Proviso.

Orally.—The examination herein alluded to is an oral examination. No oath or affirmation whatever is to be administered. Notes made by a Police Officer cannot be taken into consideration as evidence unless verified by the deposition in Court of the officer making them.

Sections 145 and 154, Act XXV of 1861, placed the law of India on the same footing as that of England. The provisions of Sections 145 and 154 have been retained intact in Sections 119 and 126 of the present Act; a Police Officer must be examined and state what he knows in the same way as any other witness. He may refresh his memory with any notes he may have made (*vide* Section 159, Act I of 1872), but his motives and his conduct will, like those of any other witness, be sifted in Court by cross-examination. A dying declaration reduced to writing by a Police Officer is not evidence in a case. The fact that it was really made, and its substance, must be proved on oath by witnesses.

(146) 120. No Police Officer or other person shall offer any inducement to an accused person, by *threat or promise, or otherwise*, to make any disclosure or confession, whether such person be under arrest or not.

No inducement to be offered to confess.

But no Police Officer or other person shall prevent the person arrested, by any caution or otherwise, from making any disclosure which he may be disposed to make of his own free will.

Shall offer any inducement by threat or promise, or otherwise.—*In re Nabadwip Chandra Gowwanie*—*Held*, that what a prisoner said in answer to questions put to him by a Police Officer was admissible, no threat or deception having been used, or any false hope held out. *Held* also, that on the trial the answers of the prisoner to questions of the Magistrate, whether that officer acted as a Justice of the Peace or Magistrate, were admissible, and the Magistrate was quite right in telling the prisoner that if he objected to answer, the fact would be noted (1 B. L. R., 15; 15 W. R., 71, note).

Where the Police told the prisoners that he would get them released if they would speak the truth, the Calcutta High Court held that such conduct was illegal, and that no part of the evidence as to the discovery of facts in consequence of the confession so obtained was admissible (8 W. R., 13—*Dhurun Dutt Opha*).

The following sections of the Evidence Act I of 1872 deal with the subject contained in this and following sections :—

24. An admission made by an accused person is irrelevant in a criminal proceeding, if the making of the admission appears to the Court to have been caused by any inducement, threat, or promise having reference to the charge against the accused person, proceeding from a person in authority, and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

25. No admission of guilt made to a Police Officer shall be used as evidence.

26. No admission of guilt made by any person whilst he is in the custody of a Police Officer, unless it be made *in the immediate presence of a Magistrate*, shall be proved as against such person.

"In the immediate presence," &c., means a case where a Magistrate is himself conducting the investigation (*Domun Kahar*, 12 W. R., 82). There should be judicial record of the special circumstances under which confessions were received by the Magistrate, showing how far the prisoners were quite free agents (*R. v. Kodai Kahar*, 5 W. R., 6).

27. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police Officer, so much of such information, whether it amounts to an admission of guilt or not, as relates distinctly to the fact thereby discovered, may be proved.

28. If such an admission as is referred to in Section 24 is made after the impression caused by any such inducement, threat, or promise has, in the opinion of the Court, been fully removed, it is relevant.

Vide note on the provisions of these sections under Section 344, *post*.

(147) 121. No Police Officer shall record any statement or admission or confession of guilt, which may be made before him by a person accused of any offence.

Police not to record statement or confession.

Provided that nothing in this section shall preclude a Police Officer from reducing any such statement or admission or confession into writing for his own information or guidance, or from giving evidence of any *dying declaration*.

Proviso.

Dying declaration.—This clearly removes all doubt as to the admissibility of dying declarations when made to Police Officers. The law on admissions and confessions is given in Sections 24 to 28, Indian Evidence Act, quoted under the preceding section. For a full exposition of this subject see Norton's Evidence Act.

Confessions or statements by accused persons or suspected persons are said to be *extra-judicial* when made in writing out of Court, or to or in the hearing of a private individual; and *judicial* when they are made in the course of a judicial proceeding, *e.g.*, in the presence of a Judge or Magistrate (Bench J. E., 109, 122). With reference to the admissibility in evidence of extra-judicial confessions, it is an established principle of English Law, and also of this Code, that every criminative statement made in consequence of inducements held out to the accused by any person who has lawful authority, judicial or otherwise, over his person, or the charge against him, or extracted from him in any way, ought to be rejected. In order to have this effect, the inducement must be held out by some one in authority, and be of a nature to convey to the mind of the accused the idea that his condition relative to the charge against him will be rendered better or worse by his confession. If it only refer to other collateral advantages, or be held out by a person whose interference is altogether officious, the confession will be receivable (so finally settled by Judges in *Reg. v. Taylor*, 8 C. and P., 733). With reference to the *force and effect* of extra-judicial confessions when receivable, it has been settled that at least where there is proof *aliunde* of a *corpus delicti*, a full and free confession of the accused is sufficient, without any confirmation whatever, to warrant a conviction (*Reg. v. Lambe*, 2 Leach, 552); and when the proof of the *corpus delicti* is imperfect, the statement of the accused may be taken to complete it (*Reg. v. Elridge*, R. and R. C. C., 440). It is, however, a fixed rule that a person on his trial is not estopped by any confession or statement, however complete. It is always competent to him to falsify it if he can; and even if he make no attempt to do so, the credit due to it is to be weighed by the Jury; for confessions or statements have no technical or artificial effect, and condemnation should flow entirely from an actual belief in the guilt of the accused. (See Section 27 Indian Evidence Act, quoted under the preceding section.)

The whole question of *corpus delicti* in cases of homicide, is surrounded with peculiar difficulties in India. There is no place in the world where it is so needful that the body should be (1) *produced* and (2) *fully identified* as in India (see Chev. M. J., p. 48, &c., for reasons). The

fallacy of attributing to confessional evidence a conclusive effect has been abundantly confirmed by experience. The following are some of the motives which may have led to false confessions :—

(1.) A false confession of an offence may be made with the view of stifling inquiry into some more serious one of which the confessionalist is as yet unsuspected (3 Benth. J. E., 124).

(2.) The accused, though innocent, may deem himself exposed to annoyance at the hands of the prosecutor or some one else to whom his suffering as for the crimes would be acceptable (*id.*).

(3.) False confessions of guilt are sometimes made in order to benefit others (case of Maria Schowing and Anna Harlin, *Causes Célèbres Etrangères*, vol. 2, p. 200, Paris, 1827; see, also, 1 Chitty C. L., 85; Greenl. L. E., p. 248).

(4.) In the relation of sexes, *e.g.*, the woman unmarried—punishment as for seduction hazarded—the imputation invited, and submitted to, for the purpose of keeping off rivals, and reconciling parents to alliance; or the woman married—the imputation of adultery, even though unmerited, invited with a view to marriage through divorce (3 Benth. J. E., 116).

(5.) Vanity.

(6.) Terror and confusion of mind, operating on weak or timorous persons hoping by a plea of guilty to obtain leniency.

(7.) False confessions through ignorance of forensic terms, where accused conscious of *moral*, is not aware that he has not incurred *legal* guilt.

(8.) False confessions, with intent to injure others (Taylor's Med. Jur., vol. 1, p. 357).

(9.) Cause of false confession *tadium vitæ* (the false confession of a man named John Sharpe, for the murder of Catherine Elwes—Ann. Reg., 1833).

(10.) False confessions may be made through misconception of *fact*.

(11.) False confessions through physical torture.

The above causes affect every species of confessional evidence; but extra-judicial confessions are subject to additional infirmative circumstances; viz., (1) Mendacity in the deposing witness; (2) Misinterpretation; (3) and Incompleteness. (For a full investigation of the subject, see Best L. and F., pp. 327 to 344, and the authorities therein quoted.)

122. *Any Magistrate* (22 (2)) may record any statement

Powers of Magistrates to record statements and confessions.

made to him by any person, or any confession made to him by any person, accused of an offence by any Police Officer or other person. Such statements shall be recorded in the manner hereinafter prescribed for recording evidence, and such confessions shall be taken in the manner provided in Sections 345 and 346, and shall, when recorded, be forwarded to the Magistrate by whom the case is inquired into or tried. No Magistrate shall record any such confession unless, upon inquiry, *he has reason to believe that it was made voluntarily* (344), and he shall make a memorandum at the foot of any such confession to the following effect :—

“ I believe that this confession was voluntarily made.”

(Signed) A. B., Magistrate.

Any Magistrate . . . made voluntarily.—By the wording of this section it is obvious that a confession recorded by a Magistrate not having jurisdiction in the case is admissible, if, upon inquiry, the recording Magistrate

has reason to believe that it is made voluntarily. It does not appear to be necessary to caution the prisoner before recording his confession, that such confession will be used in evidence against him. It will nevertheless be as well to so caution the accused. (For further remarks on this subject, *vide* notes under Section 193, *post*.)

The confession of an accused, taken by a Magistrate having no jurisdiction to commit or try him, is imperfect if not *signed* by the accused person or *attested* by his mark, and is inadmissible in evidence; consequently oral evidence to prove that such a confession was made, or what the terms of that confession were, is also inadmissible (Section 91, Indian Evidence Act). This section simply prescribes that confessions shall be "taken" in the manner prescribed in Sections 345 and 346, but is silent as to the mode, if any, in which irregularities may be cured; and the language in the final clause of Section 346 is of itself insufficient to include confessions under this Section 122. The examination spoken of in the final clause of Section 346 is an examination taken in the course not simply of an inquiry but of a "preliminary inquiry"; *i. e.*, inquiries which are the subject of Chapters XIV and XV of this Code. It is notable that this Section 122 is part of Chapter X, relating to investigation by the Police, which is carefully distinguished in the glossary of the Code (Section 4) from "inquiry" by a Magistrate or Court; and that Sections 21 (Ch. 7) and 22 (Ch. 2) describe such confessions as confessions "during a Police investigation" (10 Bo. H. C. R., 166, 181).

(151) 123. If the person arrested appears from the information obtained to have committed the offence charged, and the offence is not bailable, the officer in charge of the Police-station shall forward him under custody to the Magistrate having jurisdiction, and shall bind over the complainants, if any, and so many of the persons who appear to be acquainted with the circumstances of the case, as may be necessary, *to appear on a fixed day* before such Magistrate, and to remain in attendance till otherwise directed.

When any subordinate Police Officer has made any investigation under this chapter, he shall, if so required by the officer in charge of the Police-station, submit a report of such investigation to him, or he may do so without such requisition, and the officer in charge of the Police-station shall then proceed as if he had made the investigation himself.

To appear on a fixed day.—In a case which is made over for investigation to the Police, the prosecutor and his witnesses should be required under this section to enter into recognizances to attend and give evidence. A recognizance binding over an accused person to appear to answer a charge should specify the *particular day* on which he should be in attendance in Court (Cr. R., 11 W. R., p. 47). The prosecutor and witnesses should be required to attend at an early date; where an interval of a month was allowed, thereby giving time for the healing of wounds before the case came before the Magistrate, *held*, that fixing a date so long after the occurrence was illegal and irregular (Bheem Mangee, 6 W. R., 52).—As the Police obtain evidence, it should be sent up, and not kept by them until it is complete (5 W. R., 6—Kodai Kahar).

(152) 124. No Police Officer shall detain an accused person in custody for a longer period than, under all the circumstances of the case, is reasonable; and such period shall not, in the absence of the special order of a Magistrate, whether having jurisdiction to inquire into or try the case or not, *exceed twenty-four hours, exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.*

If the investigation has not been completed within twenty-four hours and no such special order has been passed, and if there are grounds for believing that the accusation is well founded, the officer in charge of the Police-station shall forward the accused person to the Magistrate having jurisdiction, with a statement of the offence for which he has been arrested.

A Magistrate authorizing detention under this section shall record his reasons for so doing.

If such order be given by a Magistrate other than the Magistrate of the District or of a division of a District, he shall forward a copy of his order, with his reasons for making it, to the Magistrate to whom he is subordinate.

Exceed twenty-four hours.—A Police Officer detaining a man without reason for an hour, when he could bring him before a Magistrate at once, is wrongfully confining him (10th December, 1866, vol. 2, p. 70, R. C. C. R.—R. v. Juprusunoo Ghosaul).

This section does not apply to cases in which there has not been a continuous detention of twenty-four hours (Cr. R., 1 W. R., p. 5—R. v. Indrobeer Thoba). Where a remand is considered necessary, a remand-sheet should be sent to the Magistrate with the P. O.'s reasons for asking for remand, and the time for which remand is required. No mention is made in the Code as to the limit of the remand grantable by the Magistrate. The Bombay High Court have applied to such remands, or power to authorize detention by the Police, the term allowed for remanding an accused during the course of a preliminary inquiry. The detention by the Police during remand is quite distinct from detention in the course of an inquiry or trial (R. v. Surhya, 5 Bo. H. C. R., 31).

Exclusive of the time, &c.—These words have been added to this section by the present enactment, Act X of 1872; it is now therefore clear that the limit herein laid down, viz. 24 hours, relates only to the time prior to starting off the accused to the Magistrate, and not to the time that may be taken up on the road from the Police-station to the Sudr. The doubt, therefore, which previously existed as to the detention in Police custody by order of a Magistrate, is cleared up. Whilst the section does not require the accused person to be at once brought before a Magistrate,

as that course would defeat the object in view, it is provided that if such an order is passed by a subordinate Magistrate, he shall report the fact and his reasons for passing the order to the Magistrate of the District or of the Division of the District. A close supervision over the grant of these orders is thus secured. Any Magistrate can now authorize detention in Police custody, whether he has jurisdiction in the case or not.

(153) 125. If it appears to the officer in charge of the Police-station there is not sufficient evidence or reasonable ground of suspicion to justify the transmission of an accused person to the Magistrate, such officer shall release the accused person *on bail*, or on his own recognizance, to appear when required, and shall submit a report of the case for the orders of the Magistrate having jurisdiction. Such report shall be submitted through the superior officer of Police, mentioned in Section 117, who may, pending the orders of the Magistrate, give instructions as to the conduct of the investigation.

Procedure of Police
in case of deficient
evidence.

On bail.—Cash or Government notes may be received in lieu of bail (Section 399, *post*).

The latter part of this section has been added to the C. C. P. by the present Act X of 1872.

(154) 126. A Police Officer making an investigation under this chapter, *shall day by day enter his proceedings in the investigation in a diary*, setting forth the time at which the complaint or other information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained by his investigation.

Daily record of pro-
ceedings.

Any Criminal Court may send for the Police diaries of a case under inquiry or trial in such Court, *and may use such diaries to aid it in such inquiry or trial*. Neither the prisoner nor his agents shall be entitled to call for them, nor shall he or they be entitled to see them merely because they are referred to by the Court; but if they are used by the Police Officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such Police Officer, the provisions of the law relating to documents used for such purposes shall apply to them.

The Criminal Court *may use such diaries to aid it in such inquiry or trial*.

By this is evidently intended that the diary is to be used to assist the Court in eliciting what can be ascertained for or against the accused, and to get to the bottom of the case. The principle is the same as that on which Section 165, Act I of 1872, the Indian Evidence Act, is based. For the law relating to documents used by witnesses to refresh their memories, or by the Court to contradict a witness, will be found by referring to Act I of 1872, Sections 145 and 159 to 161. But it must be borne in mind that the contents of this diary are not *per se* to be treated as evidence. A large number of decisions are to found in the several Reports laying down that any information contained in a diary, if required as evidence, must be obtained by examining the writer of the said diary on oath as to its contents. (*Vide* the last paragraph of Section 119, *ante*.)

Vide notes under Section 119, *ante*.

(155) 127. The *investigation* shall be completed without unnecessary delay, and, as soon as it is completed, the Police Officer making the same shall forward to the Magistrate having jurisdiction *a report in the form prescribed by the Local Government*, setting forth the names of the parties, the nature of the complaint, and the names of the persons who appear to be acquainted with the circumstances of the case, and shall also send to such Magistrate any weapon or article which it may be necessary to produce before him.

The Police Officer shall state whether the accused person has been forwarded in custody, or has been released on bail or on his own recognizance.

If the accused person be detained in custody, the Police Officer shall state the fact and the cause of his detention.

The theory seems to have been that it was the business of the Police to bring up all the evidence they could get against the prisoner. The defence was the prisoner's own affair, and they knew manners too well to meddle with it.

A report, &c.—C. J. Bovill, in his charge to the Jury in the Eltham murder case, with reference to the Police inquiry said, "It did unfortunately happen that men constantly engaged in the detection of crime, when they found they had got a clue followed it in only one direction. For that reason judges and juries should be always on their guard with respect to that part of a case which depended on the testimony of the Police. If the minds of the Police had arrived at one conclusion, everything of importance tending in that direction was remembered, and circumstances that pointed in a different direction were too often but lightly regarded." It is the duty of the Police to put every fact before the Magistrate, those which bear for the prisoner as well as those that tell against him; if they do not this, they fail in their duty; otherwise the Magistrate is sure to be misled, and the risk of forming an incorrect decision is apparent. (*R. v. Pook.*)

The term "*investigation*" has been substituted for the old term "inquiry," and the words "without any expression of opinion as to the guilt of the accused person," have been omitted from the present section in its first paragraph. This is a point especially to be made a note of by old Police Officers well acquainted with the old Procedure.

(156) 128. A person accused of any non-bailable offence shall not be admitted to bail, if there appear reasonable ground for believing that he has been guilty of the offence imputed to him.

Admission to bail.

But a person accused of *any bailable offence shall be admitted to bail*, if sufficient bail be tendered for appearance before the Magistrate having jurisdiction in respect of the offence.

The law in England on this subject in criminal cases is as follows:—The bail must be of ability sufficient to answer for the sum in which they are bound (2 Hawk., c. 15, s. 4): they are usually householders; but it is for the Magistrate or Judge to act upon his discretion as to the sufficiency of the bail, and the proposed bail may be examined upon oath as to his means, though in criminal cases no justification of bail is requisite. And the Court or Magistrate may, at discretion, order that reasonable notice shall be given to the prosecutor to enable him to object to the sufficiency of the bail. No person who has been convicted of any crime by which he has become infamous is allowed to be surety for any person charged or suspected of an indictable offence. Nor can a married woman or an infant, or a prisoner in custody, be bail. Personating bail is declared to be felony by 24 & 25 Vic., c. 98, s. 34 (17th ed. Arch., 85).

Any bailable offence shall be admitted to bail.—A release on bail by the Police, under this section, of persons arrested, can only take place when the Police have arrested of their own motion (J. C. C. P. 1922 of 1864). And it has been held by J. C. Oudh, that persons apprehended and delivered over to the Police Officers by a landowner or village watchman, under Regulation II of 1797, should be regarded by the Police in the light of an accused person to be forwarded to the Magistrate or released on bail.

(157) 129. The bail to be taken under Section 128 *shall not be excessive*; and the surety or sureties shall bind himself or themselves under a specific penalty to produce the accused person before the Magistrate on or before a fixed day, *and from day to day, until otherwise directed*, to answer the complaint.

Bail not to be excessive.

Terms of security.

The words, "*and from day to day until otherwise directed*," have been added by the present Act X of 1872.

Shall not be excessive.—Lest the intention of the law should be frustra-

ted by the Justices requiring bail to a greater amount than the nature of the law demands, it is expressly declared by 2 W. & M., c. 1, that excessive bail ought not to be required; though what bail shall be called excessive, must be left to the Courts to determine, after considering the circumstances of the case. On the other hand, if the Magistrate purposely take insufficient bail, he is liable to penalties if the criminal does not appear. (Hawk. P. C., b. 2, c. 15, s. 6; R. v. Saunders, 2 Cox Cr. C., 249.)

Bail must be taken in most cases of misdemeanour, and may be taken in all, as well as in cases of felony and treason, the principle of law apparently being that it should be taken if the prisoner's appearance can be secured by it.

(158) 130. Every complainant and other person acquainted with the facts and circumstances of the case whose attendance before the Magistrate having jurisdiction is deemed necessary by the Police Officer making the investigation, shall execute a recognizance in the Form (F) given in the second schedule hereto, or to the like effect, for appearance before the Magistrate having jurisdiction in respect of the offence on a fixed day.

Complainants and witnesses to execute recognizances to appear.

If the Court of the Magistrate of the District, or Magistrate of a division of a District, be inserted in the bond, it shall be held to include any Court to which such Magistrate may refer the case for inquiry or trial, provided notice be given to such complainant or witness.

Such day shall be the day whereon the accused person is to appear, if he has been admitted to bail, or the day on which he may be expected to arrive at the Court of the Magistrate, if he is to be forwarded in custody.

The officer in whose presence the recognizance is executed shall, after delivering to the complainant or one of the witnesses a duplicate thereof, send it with his report to the Magistrate having jurisdiction.

No Police Officer shall, except as provided in the next following section, accompany the complainant or witnesses on his or their way to the Court of the Magistrate.

The second paragraph of this section has been added by the present Act X of 1872, greatly simplifying matters, for, under the original C. C. P., the complainant and each witness had to enter into a recognizance, bound separately. The last paragraph of this Section 130, read with the following Section 131, clearly makes such conduct as that of the police *in re* Puran Kusain Narasaya Pantalu, a Madras case, illegal where the attend-

ance of a certain person was required by letter, and two constables were told off to accompany the said party, under the assumption that it was their duty to prevent him speaking to any one on the road.

(159) 131. A Police Officer *shall not subject* any complainant or witness *to restraint or unnecessary inconvenience*, nor require him to give any security for his appearance other than his own recognizance.

Complainants and witnesses not to be subjected to restraint.

But if any complainant or witness refuses to attend, or to execute the recognizance directed in Section 130, the officer in charge of a Police-station may forward him under custody to the Magistrate having jurisdiction, who may detain him in custody until he executes such recognizance, or until the hearing is completed.

Recusant complainant or witness may be forwarded in custody.

Shall not subject . . . to restraint or unnecessary inconvenience.—Charges against Police Officers for undue exercise of authority under this section should contain a reference to this section. (See Section 166, P. C., and note thereto.)

The object of this section is, that as no one can be released without the Magistrate's orders, except on bail or recognizance, so the Magistrate as well as the Police is held responsible for the detention of a person illegally arrested.

(160) 132. Officers in charge of Police-stations *shall report* to the Magistrate of the District, or the Magistrate of a division of a District, the cases of all persons apprehended within the limits of their respective stations, or detained under Section 93, whether such persons have been admitted to bail or otherwise, under whatever law such persons may have been arrested.

Police to report apprehensions.

No person who has been apprehended by a Police Officer shall be discharged, except on bail or on his own recognizance, or under the special order of a Magistrate.

Discharge of person apprehended.

Shall report.—Police Officer failing to observe the provisions of this section can be punished under Section 217, I. P. C.

•(161) 133. The officer in charge of a Police-station, on receiving notice or information of the unnatural or *sudden death of any person*, shall immediately give intimation thereof to the

Police to inquire and report on unnatural and sudden deaths.

nearest Magistrate duly authorized, and shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and report the apparent cause of death, describing any mark of violence which may be found on the body, and stating in what manner or by what weapon or instrument such mark appears to have been inflicted.

The report shall be signed by such Police Officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the Magistrate of the District, or to the Magistrate of the division of a District.

When there is any doubt regarding the cause of death, the Police Officer shall forward the body, with a view to its being examined, to the nearest Civil Surgeon or other medical officer appointed in this behalf by the Local Government, if the state of the weather and the distance admit of its being so forwarded without risk of putrefaction on the road.

In the Presidencies of Madras and Bombay the Head of the village may also in like manner make the investigation, and report to the nearest Magistrate duly authorized.

This section re-enacts Section 161, Act XXV of 1861, and the provisions of this section apply to all persons, without distinction of race.

Sudden death of any person.—In cases of suspected poisoning, the following points have been laid down as necessary for inquiry :—

In cases of suspected poisoning, the following points should be inquired into, and their answers embodied in the reference to the Chemical Examiner :—

1. What interval was there between the last eating or drinking and the first appearance of the symptoms of poisoning?
2. What interval was there between the last eating and drinking and death (if this occurred)?
3. Did the person move, and if so, how far from the place when the first symptoms were noticed?
4. What were the first symptoms?
5. Did vomiting or purging occur?
6. Did the person become drowsy, or fall asleep?
7. Were cramps or twitching of the limbs observed; or was tingling in the skin or throat complained of?
8. Any other symptom noticed should be mentioned. (Agra Sudder, 21 and 24, 1865, and 5 and 11 of 1866.)

USUAL SYMPTOMS OBSERVED IN CASES OF POISONING.

POISONS.

Arsenic (<i>Native name</i> , Summul-far, Sunkhya, Hurtal, and Mausil)	{ Vomiting, burning pain in the stomach, great thirst, purging; sometimes cold skin, cramps in the limbs, and sleepiness.
Opium (Afyun, afim)	{ Sleepiness, pupils small, complete insensibility, skin sweating; vomiting seldom occurs.
Aconite (Bish)	{ Numbness and tingling in the mouth and throat, afterwards in the limbs; frothing at the mouth, sleepiness, occasionally convulsion, or delirium, or paralysis.
Dhatoora (Dhatoora)	{ Sleepiness, pupils enlarged, delirium, insensibility; vomiting rare.
Nux vomica (Koochila)	{ Twitching in the limbs, followed by violent spasm, and often lockjaw. The spasm ceases for a time, and then again returns, often without evident cause; it usually affects the whole body.

Shortest time before symptoms, five minutes. Shortest time before death, one hour.

Arsenic	{ Ordinary interval between taking the poison and the appearance of symptoms, $\frac{1}{2}$ to 1 hour. Ditto before death, 6 to 12 hours.
Opium	{ Ordinary interval before symptoms, $\frac{1}{2}$ to 1 hour. Ditto before death, 6 to 12 hours.
Aconite	{ Ordinary interval before symptoms, 15 minutes. Ditto before death, 1 to 8 hours.
Dhatoora	{ Ordinary interval before symptoms, 5 to 10 minutes. Ditto before death, 6 to 12 hours.
Nux vomica	{ Ordinary interval before symptoms, $\frac{1}{4}$ to 1 hour. Ditto before death, 6 to 12 hours.

134. An officer in charge of a Police-station may, by an order in writing, summon two or more persons as aforesaid, for the purpose of the said investigation, and any other person who appears to be acquainted with the facts of the case. Any person so summoned shall be bound to attend and to answer all questions (other than questions which would criminate him).

If the facts do not disclose a cognizable offence to which Section 127 is applicable, such persons shall not be

required by the Police Officer to attend a Magistrate's Court.

"To answer all questions."—Refusal to answer such questions is punishable by Section 179, P. C.

135. The nearest Magistrate duly authorized may hold an inquiry into the cause of any such death either instead of or in addition to the investigation held by the Police Officer, and if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence, although no specific charge has been made against any person. The Magistrate holding such an inquiry shall record the evidence taken upon it in any of the manners hereinafter prescribed, *according to the circumstances of the case.*

This section has been added to the Code by the present Act X of 1872. *According to the circumstances of the case ; e.g., in a summons case, the record to be as in a summons ; in a warrant case, as in a warraat case.*

(162) 136. The powers to be exercised by an officer in charge of a Police-station under this chapter shall be exercised, in the event of his absence from the station-house or illness, by the Police Officer next in rank present at the Police-station, above the rank of a constable.

Substitute for officer in charge of Police-station during his absence or illness.

137. Officers of Police superior in rank to officers in charge of a Police-station may exercise the same powers throughout their local jurisdictions as may be exercised by officers in charge of Police-stations within the limits of such stations.

Powers of superior officers of Police.

This section has been added to the Code by the present Act X of 1872. With the provisions of this new section read the last paragraph of Section 123, *ante*. These empower the District Superintendent of Police to call for his subordinate's investigation, and finish the inquiry himself.

138. For the purposes of this Act, an Assistant District Superintendent of Police may exercise any powers of a District Superintendent of Police, subject to the control of such District Superintendent of Police, or, in

Assistant District Superintendent of Police may exercise powers of District Superintendent.

the absence of the District Superintendent of Police and the Assistant District Superintendent, the senior officer of Police on the spot may be directed by the Magistrate of the District to exercise the powers of a District Superintendent of Police.

PART IV.

OF PROCEEDINGS TO COMPEL APPEARANCE.

CHAPTER XI.

OF COMPLAINTS TO A MAGISTRATE.

This chapter contains the provisions of Sections 37, 38, 64 to 68, 179, 180, 182, 257, 258, and 260, Act XXV of 1861. In this Part IV, say the Committee: "We have distinctly defined the classes of Magistrates who may entertain complaints, act without any complaint, or commit to the Court of Session, and have set forth the procedure necessary for compelling appearance."

(64) 139. Proceedings to compel the appearance before
Processes. a Magistrate of persons accused or suspected of offences, who have not been arrested without warrant, may be by summons or by warrant.

When summons or 140. A summons or a warrant may be
warrant may be issued. issued—

(a.) Upon a report by the Police under Chapter X; but if the person complained of is already in custody, no complaint, summons, or warrant is necessary.

(b.) Upon information or report by a Police Officer as to a non-cognizable offence, such information or report shall be regarded as a complaint.

(c.) Upon a complaint by a private person, any

person acquainted with the facts of a case may make a complaint.

(*d.*) *Upon suspicion* entertained by a Magistrate that an offence has been committed.

Clause (*c*) of this section,—a complaint need not necessarily be made by the injured party. This provision allows rather a large margin for third parties to make complaints against some one towards whom they may have a pique, and such complaints must be received with every caution, and only entertained when there is good reason for believing the accuser to be acting *bonâ fide*. Again, clause (*d*) of this section, and the second paragraph of the succeeding section, have altered the law in this respect, that a Magistrate can issue a warrant on an anonymous communication, for it is only too true that anonymous communications do arouse one's suspicions. Great care must be exercised that this power is not allowed to become an engine of spite in the hands of those well versed in making the best of malicious reports, anonymously forwarded to too credulous Magistrates, for an innocent man's ruin. (*Vide* note under the following section, *Queen v. Kali Sirkar*.)

Section 14, Act XI of 1872, contains provisions for the requisition for extradition by the Executive of any part of British dominions or Foreign Power; and the second paragraph of that section lays down the procedure to be followed by a Magistrate as to issuing a summons or warrant for the arrest of such person.

Who may entertain
complaints.

141. The Magistrate of the District,

Any Magistrate of a division of a District, or

Any Magistrate duly empowered in that behalf, in any case which he is competent to try or to commit for trial,

May entertain a complaint of an offence, whether preferred directly by the complainant, or on report of a Police Officer, and may issue process in the manner hereinafter prescribed to compel the appearance of persons accused of such offences.

Any Magistrate to whom any case is duly referred, by any Magistrate duly empowered to make such reference, may dispose of such case.

A complaint or a Police report gives jurisdiction to a competent Magistrate to inquire into or try any offence covered by the facts complained of or reported, and also to try or

Effect of complaint
or Police report.

commit for trial any person who, at the time when the complaint or report is made, or subsequently, appears to have committed the offence disclosed.

For powers which a Local Government and Magistrate of the District may confer on first, second, and third-class Magistrates, see Sections 23, 25, and 27, *ante*.

(68) 142. The Magistrate of the District,

Who may act without complaint.

Any Magistrate of a division of a District,

Or any Magistrate duly empowered in that behalf,

In any case in which he is competent to try or to commit for trial,

May, *without any complaint, take cognizance of any offence which he suspects to have been committed*, and may issue process in the manner hereinafter prescribed to compel the appearance before him of persons whom he suspects to have committed any such offence.

Which he suspects to have been committed have been substituted for the words "which may come to his knowledge." The practical difference between the law now, and the law as it was, is that under the latter a Magistrate could not issue a warrant on anonymous communication, but that under the former he can so do. Though of course it is possible to imagine cases in which a Magistrate might, *ipso proprio motu*, suspect a person, but in the greater number of cases, suspicions may be aroused by anonymous communications, and the wording of the present section empowers a Magistrate to act on such a suspicion.

Nothing in this or in the last preceding section shall be held to authorize a Magistrate to take cognizance of a case without complaint, when the offence falls under Chapters XIX, XX, or XXI of the Indian Penal Code; nor to entertain a complaint, or to take cognizance without complaint, of an offence *without sanction*, where such offence, by any law in force, may not be entertained without sanction.

Complaint or sanction required in certain cases.

Without any Complaint, &c.—One of the points referred to the Law Commissioners was, that by this section a Magistrate was empowered—but his subordinate was not—to take cognizance, *ex officio*, without complaint, and without report, of any case (not falling under certain exceptions), which may have come to his knowledge—ought the Magistrate to have power to refer to his subordinates a case of which he thinks proper to take cognizance without complaint and without report? H. M. Commissioners answered in the affirmative. (*Vide* 7th Report of 11th June, 1870.)

A Magistrate may take cognizance of a case on the information of a third person, without any complaint of the injured party (*Queen v. Ram Nullem Neozee*, C. R., 6 W. R., 3). A belief founded on private and anonymous information, is not "Knowledge," within the meaning of this

section (Queen *v.* Kali Sirkar, 4 B. L. R., 1). This section applies only to cases in which the private individual injured or aggrieved does not come forward to make a formal complaint. This section is intended to enable a Magistrate to see justice vindicated, notwithstanding that the persons individually aggrieved are unwilling or unable to prosecute. Even in such cases, the jurisdiction to arrest requires for its foundation knowledge of the fact of an offence having been committed; and that knowledge must be personal, or derived from testimony legally given. The report of the Police, or any statement short of an actual formal complaint, or of a statement made on oath, is not sufficient in law to give a Magistrate jurisdiction to issue his warrant. The force of a warrant of arrest is at an end when the prisoner is brought before the Magistrate; and the prisoner cannot lawfully be committed to prison or remanded without sufficient grounds; and in the absence of evidence, there can be no grounds (Queen *v.* Surenda Nath Roy, 5 B. L. R., 274).

Without Sanction.—As a rule, only the Officer empowered to administer a special or local law, *e.g.* Stamp Law, can institute proceedings for breach of such law (3 Bo. H. C., 35). An accused forfeited his bail by defaulting to put in an appearance; his security had to pay. The District Magistrate sanctioned accused's trial under Section 174, P. C.; on the Deputy-Magistrate's application, *held*, the Deputy Magistrate had no jurisdiction, as the case had not been referred to him by the Magistrate on complaint preferred directly to the Magistrate, or on the report of a Police Officer (Tagemudee Lahore, B. L. R., 2). A Magistrate may inquire into any case of alleged oppression or injustice, but should such case turn out to be of a civil nature, he shall stop proceedings (Zemindar of Colgong, 1 W. R., 12).

How far Magistrates are protected.—Neither Act XVIII of 1850 nor this section, protects a Magistrate who has failed to act reasonably, carefully, and circumspectly in the discharge of his duties (Knayak Diookar *v.* Bait Itcha, 3 Bo. R., 36). Act XVIII only protects Judicial Officers from being sued in respect of acts done by them in good faith in the discharge of their judicial functions. When a plaint is presented to a Judge, which complains of a wrongful act on the part of an officer, the Judge is bound to receive the plaint and to leave it to the Defendant to plead Act XVIII of 1850 (Vedkab Shrinivas *v.* Armstrong, 3 Bo. R., 47).

Who may commit (179) 143. The Magistrate of the District,
for trial.

Any Magistrate of a division of a District,
Any Magistrate of the first class, or
Any Magistrate duly empowered in that behalf,
May commit any person to the Court of Sessions for any
offence triable by such Court.

Vide Sections 23, 25, and 33, *ante*.

(66) 144. When, in order to the issuing of a summons

Examination of complainant. or a warrant against any person for any offence, *a complaint is made* to a Magistrate, such Magistrate, if he is competent to receive such complaint, shall examine the complainant.

The examination shall be reduced into writing in a summary manner and signed by the complainant, and also by the Magistrate.

Where the complaint has been made by petition, and the Magistrate neglects to examine the complainant, the trial of the person accused shall not be set aside on this ground.

Complaint is made.—A Magistrate is bound to receive all complaints, whether they be preferred orally or in writing. A Magistrate cannot refuse a summons to a complainant, even in a case in which the charge might have been laid at the Police-station in the first instance, but is bound to examine the complainant on oath, and pass orders on the case (*Ameer Mahomed v. G. Brass*, 14 W. R., 36). When an accused person appears voluntarily before a Magistrate to answer a charge, the want of a complaint on oath necessary for issuing a summons or warrant becomes immaterial (*R. v. Sada Shiva'ppa*, 5 Bo. H. C. R., 29).

145. If the Magistrate be not competent to receive the complaint, he shall refer the complainant to a Magistrate having jurisdiction.

Procedure by Magistrate not empowered to hear complaint.

This section has been added by Act X of 1872.

(180) 146. If the Magistrate *sees cause to distrust the truth of a complaint*, he may postpone the issuing of process for compelling the attendance of the person complained against, and *may direct a previous inquiry* or investigation to be made into the truth of the complaint, either by means of any officer subordinate *to such Magistrate, or of a local Police Officer, or in such other mode as he thinks fit*, for the purpose of ascertaining the truth or falsehood of the complaint.

Postponement of issue of process.

If such inquiry or investigation is made by means of some person other than an officer exercising any of the powers of a Magistrate or a Police Officer, such person shall exercise all the powers conferred by this Act on an officer in charge of a Police-station, except that he shall have no power to make an arrest.

Sees cause, &c.—Whenever a Magistrate sees cause to distrust the truth of a complaint, the best thing he can do is to take advantage of the provisions of this section and *direct a previous inquiry*. The notes made during an inquiry called for under this section cannot be used till verified, and even then they are not evidence—the statement on oath of the party who made the notes is necessary as legal evidence (4 W. R., 8). When a Magistrate decides on instituting a local inquiry, the J. C. Oudh is of opinion that he should direct the inquiry to be made by a Subordinate Magistrate rather than by a Police Officer. The Magistrate can of course direct a *previous inquiry* in any “*such mode as he thinks fit*,” and very rightly is this discretion accorded him ; nevertheless, to avoid confounding judicial and police functions, and so as not to mislead the Police regarding their true character and functions, it would be as well not to refer to the Police for investigation, report, &c., cases not ordinarily cognizable by them, except in very rare and exceptional cases, and then only to ascertain some specific point which the Police can report of their own knowledge. The power given by this section extends to warrant trials ; under the original Code it only extended to Session cases.

(67, 180) 147. The Magistrate before whom such complaint is duly made may, if, after examining the complainant, there is in his judgment no sufficient ground for proceeding, dismiss the complaint. The dismissal of the complaint shall not prevent subsequent proceedings.

If it appears to such Magistrate that there is sufficient ground for proceeding, he shall, if the case appears to be a summons case, issue his summons, or, if the case appears to be a warrant case, his warrant, for causing the accused person to appear before himself or some other Magistrate having jurisdiction.

The law, which was before doubtful, and which called forth many rulings as to cases wrongly dismissed, and cases rightly dismissed, is now clearly worded, embodying some of the dicta, and superseding a lot more, and making reference to a good many reported cases unnecessary. It is clearly enacted, as held in *R. v. Horaik Chunder Norolaka* (8 W. R., 12), that a complaint cannot be dismissed without examining the complainant. After examination of the complainant, dismissal is optional with the Magistrate ; but this is only so *prior* to issuing a process. If process issue, it is because the Magistrate considers there is sufficient ground for proceeding, and in such case he must proceed to dispose of the case under either Chapter XV, XVI, XVII, or XVIII. It is for the officer who examines the complainant to decide whether a summons or warrant should issue (*Cal. H. C. 6-01 1864*) ; and such order ought to be in the Magistrate's own handwriting (10 W. R. Cr. Cr., 1).

Where a complaint is preferred before a Magistrate, and the witnesses named by the complainant are summoned and attend, but the com-

plainant is absent, Magistrate may, if he thinks it unnecessary to carry on the inquiry in the absence of the complainant, discharge the accused (11 W. R., p. 39).

A, a silk manufacturer, complained before the Magistrate that B had broken his contract to work as a silk-spinner for three years in his silk-factory, and prayed that, under Act XIII of 1859, his complaint might be inquired into. No *prima facie* proof of B having received an advance being adduced, the Magistrate rightly dismissed the complaint under *this* section. In order to sustain a conviction under Act XIII of 1859 against a workman, it is essential to show that the latter refuses to perform work in respect of which he has received an advance (H. C., Calcutta, 7th September, 1867, vol. iv. p. 31, R. C. C. R.).

A S. J. is not competent to order a Magistrate to proceed by issuing a summons or warrant, or to hold further inquiry in a case dismissed by him under this section *before* the issue of a summons. If such a case exhibits negligence or ignorance on the part of a Magistrate, the S. J. should report it to the High Court (No. 432 of 1863, Calcutta H. C.).

If a *prima facie* case of a criminal offence be made out, even although a civil suit would be the most convenient or appropriate remedy, a Magistrate is bound to issue a summons or a warrant, as the case may require (8 W. R., p. 65—R. v. Nubhas Muhton). Civil proceedings are no bar to a prosecution; but as a rule, if a civil suit is pending between the disputants, it is as well not to take up the case criminally until the civil suit is decided. (See 9 W. R. 22, and 17 W. R. 46.)

(257) 148. When a complaint is made before a Magistrate having jurisdiction in the case, that

In what cases a
summons may issue.

any person has committed, or is suspected of having committed, any offence triable by such Magistrate and punishable with fine only, or with imprisonment for a period not exceeding six months, or both, the Magistrate may issue his summons directed to such person, requiring him to appear at a certain time and place before such Magistrate to answer to the complaint.

If the Magistrate believes that the accused person is about to abscond, he may, instead of issuing a summons, issue a warrant in the first instance for the arrest of such person.

This section is similar to Section 257, Act XXV of 1861, Chap. XV. It refers to summons cases. The issuing of a summons or warrant does not affect the character of the offence. (*Vide* Explanatory note 7 to Schedule IV.)

The strongest evidence *before* a trial, being only *ex-parte*, is but suspicion; it is not proof—weak evidence is a ground of suspicion, though in a lower degree (B. C. L., 610).

(179, 248) 149. When a complaint is made before a

In what cases warrant may issue on complaint.

Magistrate having jurisdiction in the case, that any person has committed, or is suspected of having committed, any offence triable by such Magistrate and punishable with imprisonment for a period exceeding six months,

Or when a complaint is made before any Magistrate empowered to commit persons for trial before the Court of Session that any person has committed, or is suspected of having committed, any offence triable exclusively by the Court of Session, or which in the opinion of such Magistrate ought to be tried by the Court of Session,

Such Magistrate may issue his warrant to arrest such person, or, if he thinks fit, his summons requiring him to appear to answer such complaints.

This section contains the substance of the provisions of Sections 179 and 248, Act XXV of 1861, as amended by Act VIII of 1869, and refers to warrant cases.

(260) 150. If the person served with a summons does not appear before the Magistrate at the time mentioned in such summons, and the Magistrate is satisfied that such summons was duly served in what the Magistrate deems a reasonable time before the time therein appointed for appearing to the same,

Warrant to arrest if summons not obeyed.

Or if it appears to the Magistrate that, after due diligence, the summons could not be served according to the provisions of this Act,

The Magistrate may *issue his warrant to apprehend* the accused person.

Issue his warrant to apprehend.—If the summons is not obeyed, the Magistrate may issue his warrant to apprehend the accused. The H. Ct., Calcutta, in their No. 379 of 28 April, 1865, ruled that in cases punished under the Penal Code with imprisonment for a period not exceeding six months, if a warrant had been issued under the provisions of Section 260, Act XXV (the provisions of which section have been enacted in this Section 150), and could not be served, the process of attachment of property could not issue (4 R. J. P. J., 415).

(182, 261) 151. In cases, of whatever nature, in which the Magistrate thinks fit to issue a summons, he may, if he sees sufficient cause, *dispense with the personal attendance of the*

Magistrate may dispense with personal attendance of accused.

accused person and permit him to appear by an agent duly authorized to act in his behalf.

But it shall be in the discretion of such Magistrate at any stage of the proceedings to direct the personal attendance of the accused person.

Dispense with the personal attendance, &c.—Where the personal attendance of an accused is dispensed with, a recognisance bond, if such is deemed necessary, should be taken from him, and not from his agent, binding him (the accused) to appear, either in person or by agent. A Magistrate has no legal authority to secure the attendance of an agent by such a bond (*Reg. v. Lullubhái Jussubhái*, Bo. H. C. R., vol. ii, Part II, p. 64).

If a defendant is allowed to appear by agent during an inquiry under this chapter, the Magistrate has no power to direct that defendant shall not appear by agent at the Court of Sessions (*Queen v. Hurnath Roy*, 2 W. R., Cr. R., p. 50).

A complaint may be made, and the prosecution conducted by any person acquainted with the facts of the case, but the party injured cannot authorize another, by a power of attorney, to appear for him (H. C., Madras Pro., 16th July, 1862).

The complainant, if present to give evidence, may employ a legal practitioner to conduct the prosecution (H. C., Madras Pro., 15th September, 1862). See Act XX of 1865.

There is no appeal against the order of the Magistrate refusing to dispense with the personal attendance of an accused (H. C., Calcutta, 567 of 1862).

CHAPTER XII.

OF THE SUMMONS.

This chapter contains the provisions laid down in Chapter IV, Act XXV of 1861, Sections 69 to 75, as amended by Act VIII of 1869, and refers to summons on parties charged with or suspected of offences. The provisions of this chapter do not relate to the service of a summons upon a witness. This is clear enough from the Code as now arranged, but was far from clear as it originally stood.

(69) 152. Every summons issued by a Magistrate to an

Form of summons. accused person shall be in writing (in duplicate), and shall be signed and sealed by such Magistrate, and shall be in the Form (A) given in the second schedule to this Act, or to the like effect.

The particulars as to time, place, and person, required by Section 440, to be set forth in a charge, apply also to summonses issued under Section 152. The summons must clearly inform the person summoned of what particular act he is accused. He must not only be summoned "to answer a charge of assault," but "to answer a charge of assaulting Peer Khan, complainant, at Lacknow, on such a day," or whatever the offence may be.

(70) 153. A summons shall ordinarily be served through a Police Officer; but the Magistrate issuing the summons may, *if he see fit*, direct it to be served by any other person.

Summons by whom served.

If he see fit.—The original section on this subject was amended by Section 4, Act VIII of 1869; the words, "if immediate service be necessary and no Police Officer be immediately available," were omitted, and the words "if he see fit" substituted; so that under the substituted section a Magistrate was not *obliged* to issue a summons through a Police Officer. Under the original section he was, if a Police Officer was available. The present Section 153 contains the provisions of the old Section 70, C. C. P., as amended by Act VIII of 1869, the term "*be served*" being used instead of "*be issued*."

(71) 154. The summons shall be served *on the accused* personally, *in any district where he may be*, by exhibiting one of the copies and delivering or tendering the other copy to him; or, in case the accused person cannot be found, the copy may be left for him with some adult male member of his family residing with him; and the person summoned, or the person with whom the copy is left, shall sign a receipt therefor.

Summons how served.

On the accused.—This section refers to the service of a summons on an accused, not on a witness.

In any district where he may be.—The summons may be served on the party named in it, wherever he may be, residing in the jurisdiction of any Magistrate, without any application in the first instance to the authority of that particular district. This sets at rest the contradictory rulings of different Courts.

(72) 155. When the accused person cannot be found, and there is no adult male member of his family on whom the service can be made, the serving officer shall fix a copy of the

Service when the accused cannot be found.

summons on some conspicuous part of the house in which the accused person ordinarily resides.

(73) 156. A Magistrate may (notwithstanding the issue of such summons), either before the appearance of the accused person as required by such summons, or after default made by him so to appear, issue a warrant of arrest against such person.

Issue of warrant in addition to summons.

(74) 157. The Magistrate of the District, a Magistrate of a division of a District, or a Magistrate of the first class duly authorized in that behalf, and having local jurisdiction in such District or division of a District, may issue a summons or warrant for the apprehension of any person within such District or division of a District, in respect of any offence known or suspected to have been committed by such person in a different District or division of a District, or on the high seas, or in a foreign country, and for which, if committed within the local jurisdiction of such Magistrate, he might issue a summons or warrant.

Summons or warrant for offence committed beyond local jurisdiction.

Vide notes under Section 2, Indian Penal Code ; also Sections 8 and 9, Act XI of 1872, as to extent of British Indian territory, and inquiry into offences committed in Native States.

(75) 158. The provisions relating to a summons, its issue and service, contained in this chapter, shall be applicable to every summons issued under this Act, except summonses to serve as a juror or assessor :

Provisions in this chapter as to form, service, and issue of summons applicable to all summonses.

Provided that, when the person summoned is in the service of Government or of any Railway Company, the Court or Magistrate issuing the summons may send the summons to the head of the office in which the person summoned is employed, and such head shall thereupon cause the summons to be served on the person named therein.

This section was substituted by Section 4, Act VIII of 1869. Formerly this section did not render the preceding sections applicable to the service of a summons. The proviso to this section was also added by Act VIII of 1869, and this section as then altered has been retained intact in the present C. C. P.

CHAPTER XIII.

OF THE WARRANT.

This chapter deals with the provisions of Sections 76 to 83 and 88 to 99, and Sections 181 to 185 of Act XXV of 1861, as amended by Act VIII of 1869. The alterations and additions made by the present enactment are alluded to under the sections to which they refer.

(76) 159. Every warrant issued by a Magistrate shall be in writing, *and shall be signed* and sealed by such Magistrate, and shall be in the Form (B) given in the second schedule to this Act, or to the like effect.

Form of warrant.

The warrant issued under this chapter remains in force until the person arrested is brought into the presence of the Magistrate who issued it and so long as he remains before such Magistrate. If the person arrested is to be remanded to custody, an order must be made under Section 194, or a warrant issued under Section 303.

Effect of warrant of arrest.

The last paragraph of this section has been enacted by the present Act X of 1872, and clearly lays down the effect of a warrant of arrest, a point about which there was some obscurity under the original C. C. P. The law clearly requires the warrant *to be signed* by the Magistrate issuing it. Initials, the Punjab Chief Court have held, are not the signature here required.

(181) 160. It shall be *in the discretion of a Magistrate*, in issuing a warrant for the arrest of any person, to direct by endorsement on the warrant that, if such person be willing and ready to give bail in a sum to be fixed by the Magistrate for his appearance before the Magistrate on a specified day (which sum and day shall be named in such endorsement) to answer the complaint, the officer to whom the warrant is directed shall accept such bail, and shall release from custody the person complained against.

Magistrate may direct bail to be taken.

Bail-bond to be forwarded.

If bail is given, the officer shall forward the bail-bond to the Magistrate.

In the discretion of the Magistrate.—When possible, the option of bail should be allowed as permitted by the provisions of this section. By Clause 15, Section 19, Act VII of 1870, bail-bonds in criminal cases may be on plain paper.

(77) 161. A warrant shall ordinarily be directed to a Police Officer, but the Magistrate issuing a warrant may, *if immediate execution be necessary and no Police Officer be immediately available*, direct it to any other person.

Warrants to whom directed.

This section contains the provisions of Section 77, Act XXV of 1861; that section was somewhat amended by Section 4, Act VIII of 1869, but the present Section 161 takes us back again to the law as it originally stood, altering the section substituted by Section 4, Act VIII of 1869. Under the law, as it now stands, it is only “if immediate execution is necessary and no Police Officer be immediately available,” that the Magistrate may direct the warrant to any other person.

162. The Magistrate of the District *may direct* a warrant or warrants to landholders, farmers, or managers of land, for the arrest of any escaped convict, proclaimed offender, or person who has been accused of a non-bailable offence, and who has eluded pursuit.

Warrant may be directed to landholders, &c.

Such landholder or other person shall acknowledge the receipt of the warrant and shall be bound to execute it should the person for whose arrest it was issued enter on or be in his estate, farm or land under his charge.

Should the person against whom such warrant is issued be arrested, he shall be made over to the nearest Police Officer with the warrant, and such Police Officer shall cause such accused person to be carried before the Magistrate having jurisdiction, unless bail may be and is taken under Section 160.

May direct.—This is a new section, and is inserted in the C. C. P. for the first time. It follows the provision of an old regulation, and authorizes the issue of a warrant to landholders and other persons for the apprehension of criminals on their estates. The provisions of this section will doubtless be found most useful in arresting escaped convicts, proclaimed offenders, and others herein alluded to; for farmers, landowners, and managers of land can do much, if they choose, in bringing proclaimed offenders to justice, but unfortunately they oftener choose to remain silent than to act of their own accord. The provisions of this section give the Magistrate of the district a most wholesome power to keep landholders and others up to their legitimate duties.

(78) 163. When a warrant is directed to a person other than a Police Officer, any other person may aid in executing such warrant, if the person to whom the warrant is directed be near at hand and acting in the execution of the warrant.

Warrants directed to any person other than a Police Officer.

(79) 164. A warrant may be directed to several persons, and when so directed, may be executed by all, or by any one or more of such persons.

Warrant to several persons.

(80) 165. A warrant directed to a Police Officer may also be executed by any other Police Officer *whose name is endorsed* upon the warrant by the officer to whom the warrant is directed *or endorsed*.

Warrant directed to Police Officer.

Whose name is endorsed.—From the terms of this section it is apparent that the power of endorsing the warrant to another Police Officer for execution is restricted to the Police Officer to whom the warrant is directed. *He* might *re-endorse* it to another, but the endorsee cannot transfer the warrant to another without reference to the officer to whom it was originally directed.

Or endorsed.—These words have been added to the law by the present enactment, Act X of 1872.

(81, 108) 166. The Magistrate by whom a warrant of arrest is issued, may attend personally for the purpose of seeing that the warrant is duly executed.

Magistrate issuing warrant may superintend its execution.

Any Magistrate may also at any time direct the arrest in his presence of any person for whose arrest he is competent to issue a warrant.

Arrest in presence of Magistrate.

Any.—The term "*any* Magistrate" has been substituted for "*the* Magistrate" in the second paragraph of this section.

(83) 167. A warrant issued by a Magistrate shall ordinarily be executed in the district in which it was issued.

Where warrant may be executed.

But if the person against whom the warrant is issued *escapes, goes into, or is in any place out of the district in which the warrant was issued*, the warrant may be executed in such place.

Escapes, goes into, &c.—The second clause of this section has been added

to the provisions of this section by the present Act, so that a warrant may be executed in any place to which the accused escapes, goes into, or is in, out of the district in which the warrant was issued.

(86) 168. A Magistrate may direct a warrant to be executed outside his local jurisdiction, either after endorsement by a Magistrate within whose local jurisdiction it is to be executed or without such endorsement.

Magistrate may issue warrant for execution in places outside his jurisdiction.

If the warrant is to be so endorsed, it may be sent by post to the Magistrate within whose local jurisdiction it is to be executed and by whom it is to be endorsed.

If the warrant is not to be endorsed, it shall be entrusted to a Police Officer, to be taken either to a Magistrate or to a Police Officer (not below the rank of an officer in charge of a station) in whose local jurisdiction the warrant is to be executed.

(85) 169. If a warrant be executed, whether with or without endorsement, outside the district in which it was issued, the person arrested shall, unless the Magistrate who issued the warrant be within twenty miles or be nearer than the Magistrate in whose local jurisdiction the arrest was made, or unless bail be taken under Section 160, be carried before the Magistrate in whose local jurisdiction the arrest was made.

Procedure on arrest of person against whom warrant was issued.

(84) 170. A Magistrate or Police Officer to whom a warrant is directed for execution shall execute the same or cause it to be executed, and any Magistrate before whom a person is brought under the provisions of Section 169 shall, if the person arrested appears to be the person intended by the Magistrate who issued the warrant, direct his removal in custody to the Magistrate who issued the warrant ;

Procedure by Magistrate before whom arrested person is brought.

Or, if the offence be bailable, and the person arrested be ready and willing to give bail, shall take bail for his appearance before the Magistrate who issued the warrant, and the recognizance or bail-bond shall be forwarded to such Magistrate.

In this section the word Magistrate includes a Com-

missioner of Police and a Magistrate of Police in the Presidency towns.

This and the two preceding sections contain the pith of the provisions of Sections 84 to 86, Act XXV of 1861.

(183) 171. If any person accused of an offence not coming within Section 148 absconds or
Proclamation for person absconding. conceals himself, so that, upon a warrant issued against him, he cannot be found, the Magistrate having jurisdiction shall, if he thinks, *whether after taking evidence or not*, that such person *absconds or conceals himself* for the purpose of avoiding the service of the warrant, *issue a written proclamation*, requiring him to appear to answer the complaint within a fixed period not less than thirty days.

Such proclamation shall be publicly read in some conspicuous place of the town or village in which the accused person usually resides, and shall be affixed on some conspicuous part of his ordinary place of abode, *or on some conspicuous place of such town or village*.

A copy of the proclamation shall also be affixed on some conspicuous part of such Magistrate's Court-house.

A statement by the Magistrate to the effect that the proclamation was duly made shall be conclusive evidence of due compliance with the law.

If he thinks that such person absconds or conceals himself.—When acting under the provisions of this section, it will be well to bear in mind that the fact that about the time of the commission of an offence the suspected person left his home, is only *presumptive* evidence of an intention to escape being rendered amenable to justice. A man may change his abode for many reasons; his object in absconding may be to avoid a civil process or an inquiry into some *other* offence (3 Benth. J. E., 175-180); and even the clearest proof that the accused has absented himself to avoid the actual charge against him, although a strong circumstance, is by no means conclusive evidence of guilt. He may be aware that a number of suspicious though inconclusive facts will be adduced in evidence against him; he may not be able to procure legal advice in his defence; he may be assured that powerful and wealthy individuals have resolved his ruin, or that witnesses have been bribed to bear false testimony against him. Such considerations are entitled to weight at all times, and in all places. The evasion of, or flight from justice, is merely *a circumstance*, a fact always of importance to take into consideration, and, combined with others, may afford strong evidence of guilt; but which, like any other piece of

presumptive evidence, it is equally absurd and dangerous to invest with infallibility (Best L. & F., 320-324).

Issue a written proclamation.—This process is not to issue whenever a warrant fails of its effect. The officer sent to serve the warrant should be examined as to the measures adopted by him to serve it; and if on his evidence, or in any other manner, the Magistrate is satisfied that the accused is evading justice, then, and then only, can the processes of proclamation and attachment issue (Queen v. Bishonath Sircar, 3 W. R., 63). See also Shewdyal Singh v. Griban Singh, 6 W. R., 73.

The words *whether after taking evidence or not* have been added to the law by the present Act; it is optional with a Magistrate to take evidence on this point or not, but before issuing his proclamation it would be better if, as a rule, the Magistrate first satisfied himself that the accused was evading justice.

The words "*or on some conspicuous place of such town or village*" have been added by the present C. C. P. So also has the last paragraph of this Section, 171.

The following instructions, taken from Oudh Judicial Rules, pages 189, 190, regarding the record of evidence in cases of persons absconding, and the issue of proclamations for the apprehension of such persons, are of greater importance, now that, under Section 327 of the Act, the record of the evidence taken in the absence of the accused may on his apprehension be put in on his trial, if it is not practicable to procure the attendance of the witnesses.

A distinction should be drawn between cases in which certain persons are judicially proscribed and proclaimed, and those in which no evidence against particular individuals has been recorded. In cases in which there is *prima facie* evidence against a man who is supposed to have fled from justice, that evidence should be judicially recorded, it will be for the Judicial Officer to determine, whether it is sufficient to justify a proscription; and methodical registers of such proscribed persons should still be kept up by Magistrates, who will of course communicate the particulars to the Police, so as to enable them to adopt measures for the apprehension of the criminals. When, upon the evidence, a man is declared to be *prima facie* guilty, and a fugitive from justice, he is in fact adjudged an outlaw; this is evidently a judicial proceeding, and the Magistrate, being judicially satisfied, will proceed as directed in this and the following section. (44 J. C. O. Pref.)

(184) 172. Such Magistrate may order the attachment of any property, movable or immovable, *or both*, belonging to the person so absconding or concealing himself.

Attachment of property of person absconding.

Such order shall authorize the attachment of any property within the jurisdiction of the Magistrate of the District within whose district it is made; *and it shall authorize the attachment of any property without the jurisdiction of the Magistrate of the District, when endorsed by*

the Magistrate of the District in which such property is situated.

The attachment under this section shall, if the property ordered to be attached be land paying revenue to Government, be made through the Collector of the District in which the land is situate, and, in all other cases, by seizure under the order of the Magistrate having jurisdiction; or by the appointment of a manager and receiver; or by an order prohibiting the payment of rent to the absent person; as such Magistrate deems proper.

If the absent person does not appear within the time specified within the proclamation, the property under attachment *shall be at the disposal of Government*, but shall not be sold until the expiration of six months, unless it is of a perishable nature, or such Magistrate considers that the sale would be for the benefit of the owner.

Or both.—The words *or both* have been added to this section by the present C. C. P. The words “at the same time” after “such Magistrate may” have been omitted, so that the Magistrate need not now issue his warrant of attachment simultaneously with the proclamation referred to in Section 171, *ante*, as he was obliged to do formerly under the Madras H. C., No. 842, of 12th May, 1869.

There is no provision of law enabling M. to investigate claims of third parties to property attached under Sections 172, 173 (*Queen v. Chunroo Roy*, H. C. Calcutta, Cr. R., 7 W. R., p. 36).

If an absconding party gives himself up within six months referred to in this section, within which the property of the accused is not to be sold, he is not thereby entitled to the restoration of his property attached. An order attaching the property may be legally passed after the return of the absconding party, if not passed before. The Magistrate should satisfy himself, upon good and sufficient evidence, that the accused has absconded to evade justice, before ordering the process of proclamation and attachment to issue.—August 18th, 1865, vol. v. p. 142, R. J. P. J. (*In re Bishonath Sircar, petitioner*).

Shall authorize the attachment, &c.—This section extends the powers of the Magistrate to the attachment of property without his jurisdiction under certain circumstances; viz. when endorsed by the Magistrate of the District in which such property is situated.

With reference to the provisions of this and the preceding section, the following remarks by the J. C. O. will be found generally useful. “Cases of judicial proscription will occur:—

“1st. In regard to very heinous offences in which, although the accused persons are not seized, the evidence implicating them is put on record. Under this head will also come the cases of escaped prisoners.

“2nd. In any cases in which one or more of the parties being apprehended and tried, the evidence implicates other parties who appear to be

fugitives from justice, and who are on that account proscribed and proclaimed."

When the evidence is not considered sufficient to justify the imputation of *prima facie* guilt to persons whose names may have been brought forward by the police or otherwise, the circumstance should be noted.

The register of judicially proclaimed offenders will then be kept up in the Magistrate's office, the only difference from the former practice being that any persons hitherto entered on vague suspicion, or on any purely police grounds, without the record of evidence against them, will be omitted. Magistrates should, however, be careful that no heinous criminals, against whom evidence exists, are omitted merely from failure to record the evidence; it should always be recorded; in such serious cases absconded criminals should be entered both in the district in which they were proclaimed and in that (if another) in which their homes are situated, but the district registers should not be overburdened with all the names proclaimed in any district.

Attention is also requested to the instruction that in very heinous cases, even when no particular offenders are implicated by name, the evidence of the circumstances attending the perpetration of the crime should be put on record for future use. In ordinary cases the police inquest may suffice, but whenever there are circumstances of unusual atrocity, difficulty, or importance, the local Magistrate (Tahsildár or Honorary Assistant, or whoever he may be) should proceed to the spot and make a judicial pre-cognition and record. When the case is sufficiently important, a European officer should not fail to do the same. All proclamations for the arrest of offenders issued by Magistrates should be sent in the first instance to the District Superintendent of Police, who will have them entered in his office register, and then issue them to all his Police-stations. The offenders will thus be simultaneously proclaimed at all the Police-stations of the District (43 J. C. O., Pref.).

Shall be at the disposal of Government.—Property declared to be at the disposal of Government, can only be restored by Government (Government of Bengal *v.* Meer Surwar Jan, 18 W. R., 34).

(185) 173. When any person *whose property has come under the disposal of Government* under Section 172, *appears* or is found within two years after the attachment of the property, and proves to the satisfaction of the Court of Session or High Court trying him for the offence of which he was accused, or, if he is not tried in, or committed for trial for that offence to either of those Courts, to the satisfaction of the Magistrate of the District, that he did not abscond or conceal himself for the purpose of evading justice, such property, or, if the same has been sold, the proceeds thereof, shall be restored to him.

Restoration of forfeited property.

Whose property has come under the disposal.—Held by a majority of the

Court (Seton-Karr J. dissenting) that this and the preceding section make no provision for any investigation by a Magistrate of the claims of third persons to property which has been attached. The claimants are not barred by the sale, and may bring a suit in the Civil Court against the purchaser to establish their right (*R. v. Chunroo Roy*, 7 W. R., 35). If the proceedings have been regularly conducted, a suit on the part of the absconding party will not lie (*Bakhowne Singh*, 8 W. R., 207, Civil Cases). It is for the accused to show that he has not been evading justice (*Bissonath Sircar*, 3 W. R., 63).

The word "*appears*" in this section was added to the original C. C. P. by Act VIII of 1869, so as to make the section applicable to accused surrendering themselves, as well as to arrested offenders.

(88) 174. On the arrest of a person for whose apprehension a warrant has been issued under the provisions of Section 157, in respect of an offence known or suspected to have been committed in another District or division of a District, the Magistrate who issued the warrant shall, unless he is authorized to complete the inquiry himself, send the person arrested to the Magistrate within the limits of whose jurisdiction the offence is known or suspected to have been committed, or shall take bail for his appearance before such Magistrate, if the offence of which such person is suspected is bailable.

When the Magistrate who issued the warrant cannot satisfy himself as to the Magistrate to whom the person arrested should be sent, the case shall be reported for the orders of the High Court.

(89) 175. If the arrest was made under warrant issued under Section 157 by a Magistrate other than the Magistrate of the District, such Magistrate shall send the person arrested to the Magistrate of the District, unless the Magistrate in whose jurisdiction the offence is suspected to have been committed issues his warrant for the arrest of such person, in which case the person arrested shall be delivered to the Police Officer executing such warrant, or shall be sent to the Magistrate by whom such warrant was issued.

If the offence of which the person arrested is suspected has been committed in the jurisdiction of another Subordinate Court of the same District, the Magistrate who issued

the warrant under Section 157 shall send the person arrested to the Magistrate of the division of the District in which the offence was committed.

(90) 176. A Police Officer, or other person executing a warrant of arrest, shall notify the substance of the warrant to the person to be arrested, and, if required to do so, shall show the warrant to such person.

Notification of substance of warrant.

(91) 177. In making an arrest, the Police Officer, or other person executing the warrant, shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

Warrant how executed.

(92) 178. If a person against whom a warrant of arrest is issued forcibly resists the endeavour to arrest him, the Police Officer, or other person executing the warrant, may use all means necessary to effect the arrest.

Resisting endeavour to arrest.

(93) 179. If there is reason to believe that any person against whom a warrant has been issued has entered into, or is within, any house or place, it shall be the duty of any person residing in or in charge of such house or place, on demand of the Police Officer or other person executing the warrant, to allow such Police Officer or other person free ingress thereto, and to afford all reasonable facilities for a search therein.

Search of house entered by person against whom warrant issued.

(94) 180. The Police Officer, or other person authorized by warrant to arrest a person, may break open any outer or inner door or window of any house or place, whether that of the person accused or of any other person, in order to execute such warrant, if, after notification of his authority and purpose, and demand of admittance duly made, he cannot otherwise obtain admittance.

Breaking of door or window.

(95) 181. If information be received that a person accused of any offence for which a warrant may issue, is concealed in an apartment in the actual occupancy of a woman who, according to the customs of the country, does not appear

Breaking open zenána.

in public, the Police Officer, or other person employed to execute the warrant, shall take such precautions as may be necessary to prevent the escape of the accused person.

If the accused person does not deliver himself up, the Police Officer, or other person authorized to execute the warrant, may notify his authority and purpose, and demand admittance.

If, after such notification and demand, he cannot otherwise obtain admittance, he shall give notice to any woman as aforesaid in such apartment, not being a person against whom a warrant has been issued, that she is at liberty to withdraw, and afford her every reasonable facility for withdrawing, and may then break open the apartment and execute the warrant.

(96) 182. The person arrested shall not be subjected to *more restraint* than is necessary to prevent his escape.
No unnecessary restraint.

More restraint.—A Police Officer using unwarrantable personal violence to any person in his custody, is punishable under Section 29, Act V of 1861.

(97) 183. The officer or other person executing the warrant shall, without unnecessary delay, bring the person arrested before the Magistrate before whom he is required by this Act to produce him.
Person arrested to be brought before Magistrate.

(98) 184. No Police Officer or other person shall offer to the person arrested any inducement, by threat or promise, or otherwise, to make any disclosure.
Inducements to disclosure or confession.

But no Police Officer or other person shall prevent the person arrested, by any caution or otherwise, from making any disclosure which he may be disposed to make of his own free will.

Sections 330, 331, Indian Penal Code, deal with the offences of obtaining disclosure by hurt or grievous hurt.

(99) 185. The provisions relating to a warrant and its *execution* contained in this chapter, shall be applicable to every warrant of arrest issued under this Act.
Provisions as to warrant and its execution and issue applicable to all warrants of arrest.

The term "*its execution*" has been adopted in the present section for the words "its service and issue" in the original. In fact, as this section was originally framed by Act XXV of 1861, it was found that the provisions of this chapter did not apply to the service of a warrant, and so the law was amended by Act VIII of 1869, and the words "and its service" added.

PART V.

OF INQUIRIES AND TRIALS.

CHAPTER XIV.

PRELIMINARY.

"In this chapter, we have," say the Committee in their Report, "cleared up the doubt which formerly existed as to whether a Court might, except in summons cases, allow an offence which was by law compoundable to be compounded in Court."

(432) 186. Every person charged before any Criminal Court with an offence may of right be defended by any barrister or attorney of a High Court, or by any pleader duly qualified under the provisions of Act No. XX of 1865, or any other law in force for the time being relating to pleaders.

Right of accused to be defended.

Any such person may, with the permission of the Court (but not otherwise), employ any *mukhtār* or other person not being a barrister, attorney, or pleader, to assist him in his defence.

If an accused person, though not insane, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial; and if such inquiry results in a committal, or if such trial results in a conviction, the proceedings shall

Where accused person does not understand the proceedings.

be forwarded to the High Court, with a report of the circumstances of the case, and the High Court shall pass thereon such order as to it seems fit.

This section contains the provisions of Section 432, Act XXV of 1861; that section operated to preclude mukhtárs from appearing for a defendant in criminal cases. The omission must have been unintentional, inasmuch as Section 432 militated against Section 2, Act XX of 1864. The present section allows mukhtárs to appear for defendants with the permission of the Court.

By the provisions of Section 40, Act XX of 1865, no person, not being a barrister, attorney, or pleader, is entitled to receive any fee or any reward for his services to an accused person.

Amendment 13 of 1874.—In Section 186, for the words “charged before any Criminal Court with an offence,” the following words shall be substituted (namely):—

“accused in any Criminal Court of an offence.”

(279) 187. The place in which the Court of a Magistrate is held for the trial of any offence, or for the purpose of conducting an inquiry into any case triable by a Court of Session or High Court, and also every Court of Session and every High Court, shall be deemed an open and public Court, to which the public generally may have access, so far as the same can conveniently contain them.

Criminal Courts to be open.

But the Magistrate or presiding Judge may, if he thinks fit, order that, during the inquiry into or trial of any particular case, no person shall have access to, or be, or remain in, the room or building used by the Court without the consent or permission of the Court.

With regard to investigations into railway accidents, the Government of Bengal, in their No. 5156 of 8th September, 1865, laid it down that investigation should take place at the nearest railway station to where the accident had occurred.

188. In the case of offences which may lawfully be compounded, *injured persons* may compound the offence out of Court, or in Court with the permission of the Court.

Compounding offences.

Such withdrawal from the prosecution shall have the effect of an acquittal of the accused person.

This section clears up the doubt which formerly existed, as to whether a Court might, except in summons cases, allow an offence which is by law compoundable to be compounded in Court.

In the debate on the Bill, and on the motion that certain paragraphs be inserted before this Section 188 as part of this section, the Lieutenant-Governor of Bengal remarked that “You might go through hundreds of cases that would fall within the provisions of Section 148, and ought not to be compounded, and there might be many other cases

which were not included in the amendment, but which ought to be compoundable." And Mr. Stephens remarked:—"The fact was that, until a law was introduced which defined actionable wrongs in the way in which we had tried to define contracts, you would not be in a position to say what offences were compoundable and what offences were not compoundable. The only other way of doing the thing was to go through the schedule to the Code of Criminal Procedure, case by case, and add a column stating what offences were compoundable and what offences were not compoundable."

"*Injured persons.*"—This term has been used so as to agree with the provisions of Section 140, *ante*, Clause (d).

The offence of voluntarily causing hurt is one which may lawfully be compounded, and therefore withdrawal is permissible under this section (10 Bo. H. C. R., 68).

CHAPTER XV.

OF INQUIRY INTO CASES TRIABLE BY THE COURT OF SESSION OR HIGH COURT.

This chapter contains the provisions of Chapter XII, Act XXV of 1861, as amended by Act VIII of 1869, Sections 193, 194, 201, 202, 224, 225, 226, 227, 230, 231, and Section 233, Chapter XIII, Act XXV of 1861.

189. The following procedure shall be adopted in inquiries before Magistrates in cases triable by a Court of Session or High Court.

(193) 190. When the accused person appears or is brought before the Magistrate, or, if his personal attendance is dispensed with, when the Magistrate thinks fit, the Magistrate shall take the evidence of the complainant and of such persons as are stated to have any knowledge of the facts which form the subject-matter of the accusation and the attendant circumstances.

The evidence of the witnesses for the prosecution sent up by the Police should be carefully recorded by the Magistrate, and on that evidence, and not on mere Police notes, the action of the Magistrate should be based (47 J. C. O., Pref.).

There is nothing to prevent a person, who has been suspected and apprehended for an offence, from being examined as a witness on his discharge by the Magistrate (7 W. R., 44). Where there is no community of interest, any one of a number of accused persons jointly charged with the commission of an offence, may be called as a witness for or against his fellow-prisoners; but where they all stand charged with the same offence, and have each a similar interest in obtaining a discharge, their evidence cannot be received (6 W. R., 91; 7 W. R., 72).

The rule, in both civil and criminal cases in England, is that a witness sworn and examined, though even for the formal proof of a document, becomes a witness for all purposes (8 W. R., 19).

(194) 191. The complainant and the witnesses for the prosecution shall be examined *in the presence of the accused person*, or of his agent when his personal attendance is dispensed with, and he appears by agent.

Examination to be
in presence of accused.

The accused person or his agent shall be permitted to examine and re-examine his own witnesses and to cross-examine the complainant and his witnesses.

Accused may cross-
examine.

In the presence of the accused person.—It is necessary that the examination of witnesses should be held *de novo* in the presence of the subsequently apprehended prisoners in the same case, as if the case were entirely new, and the witnesses had not been examined before (1 R. J. P. J., 236).

This examination of witnesses in support of a charge in the presence of the accused was a right first recognized in England by Section 2 of 6 and 7 Will. IV., c. 114, and *in re R. v. Crowther*.

The accused must be present as an accused party, and must be allowed to cross-examine the witnesses against him, and make his defence (5 R. C. C. R., p. 41). Witnesses for the prosecution should not be allowed to give evidence as to prisoner's bad character (2 Bom. H. C. R., p. 131).

Upon trial of a prisoner it is illegal to read over to witnesses their depositions taken at a former trial, and ask them if they are true (2 H. C. N. W., P. R., 100).

(201) 192. The Magistrate may, at any stage of the proceedings, summon and examine *any person* whose evidence he considers essential to the inquiry, and recall and re-examine *any person already examined*.

Power of Magistrate
to summon and ex-
amine any person.

Any person.—This section gives the Magistrate power to summon the prosecutor, if he does not voluntarily appear, and his evidence is necessary (W. R. C. R., No. 778, 1857).

The words "*recall and re-examine any person already examined*," have been added by Act X of 1872.

And further, the Magistrate may examine as a witness for the prosecution a co-defendant, provided that at the time of his examination he was not charged with the accused, and upon his trial (Narayan Sundar, 5 H. C. R., 1).

(202) 193. The Magistrate may, from time to time, *at any stage of the inquiry, and without previously warning the accused person*, examine him, and put such questions to him as he considers necessary.

The accused person shall *not render himself liable to punishment* for refusal to answer such questions, or for giving false answers to them, but the Magistrate shall draw such inference as may to him seem just from such refusal.

Explanation.—The answer given by an accused person may be put in evidence against him, not only in the case under inquiry, but also in trials for any other offences which his replies may tend to show he has committed.

Under the present Code of Criminal Procedure, the accused comes in for a good deal of examination. First, we have Section 122, *ante*, when a case is under Police investigation, or when a statement or confession is made to a Magistrate other than the Magistrate holding the inquiry. (The procedure for recording such statements is laid down in Sections 345 and 346, *post*.) Then comes the examination here referred to, which is while the inquiry is going on, and by the Magistrate holding such inquiry. The principle of this section is evidently that the suspected party ought to have the opportunity of clearing himself, and that he may, perhaps, be able to explain away facts which tell against him. (For the effect of what one prisoner says in his confession against a fellow-prisoner, see the provisions of Section 30, Act I of 1872.)

See notes under Section 250, *post*, regarding non-responson or false responson.

At any stage.—Although the Criminal Procedure Code does not make it imperative on a Magistrate to examine an accused person at any stage of the inquiry before committing him to stand his trial at the Court of Session, the Court think it necessary to impress upon all Magistrates the expediency of the general adoption of this course at some stage or other of the inquiry (High Court Circular No. 13, 1864).

The discretionary power here given should be used to ascertain from accused how he can explain facts adduced in evidence against him, and not to drive or entrap him into making self-criminatory statements (1 Madras H. C. R., p. 199). Questions must not be put to the prisoner in the middle of the case for the prosecution, so as to supplement their case when it is defective (3 Bom. H. C. R., p. 51).

The examination of the accused here referred to does not dispense with the necessity for putting the accused on his defence after the charge has been prepared (218, *post*); and the examination here referred to cannot be recorded *before* the depositions of the complainant (1 R. J. P. J., 236).

The procedure to be observed in the examination of European British subjects charged with the commission of any criminal offence is laid down in 11 and 12 Vic., c. 42, Section 18, which is here quoted for ready reference :—

“After the examination of all the witnesses on the part of the prosecution as aforesaid shall have been completed, the Justice of the Peace, or one of the Justices by or before whom such examination shall have been so completed as aforesaid, shall, without requiring the attendance of the witnesses, read or cause to be read to the accused, the depositions taken against him, and shall say to him these words, or words to the like effect : ‘Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything, unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;’ and whatever the prisoner shall then say in answer thereto shall be taken down in writing and read over to him, and shall be signed by the said Justice or Justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards, upon the trial of the said accused person, the same may, if necessary, be given in evidence against him without further proof thereof, unless it shall be proved that the Justice or Justices purporting to sign the same did not in fact sign the same: provided always that the said Justice or Justices before whom such accused person shall make any statement, shall state to him and give him clearly to understand that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, and that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat.” But by the provisions of this Section 193, it is apparent that the Magistrate may make inquiry of the accused *without previously warning him*. This is a departure from the general policy of English law; accordingly, I have given the Lieutenant-Governor of Bengal’s reasons for this departure.

Not render himself liable to punishment.—*Nemo tenetur se ipsum accusare.* No man can be compelled to criminate himself. The general policy of our law is in accordance with the rule above stated. A Justice of the Peace, therefore, before receiving the statement of the accused, is required under Statute 11 and 12 Vic., c. 42, s. 18, to administer him the caution therein specifically set forth. A witness also is privileged from answering not merely where his answer will criminate him directly, but where it may have a tendency to criminate him (Ex. B. L. M., 4th edition, p. 931).

A Magistrate is not wrong in telling a prisoner that he is not bound to answer, but that if he objects to answer the fact will be noted; this amounts to neither threat nor inducement (Nabadwip Gowsami, 1 B. L. R., 23).

The following are Mr. Campbell’s views on the subject of this section

and Section 250, *post*, as contained in his reported speech on the C. C. P. Bill :—"The criminal law was, as the Honourable Member had said, a law of overwhelming importance in this country ; he meant not only the law for the administration of criminal justice, but the executive administration as carried on through the Magistrates. The prevailing ideas on the subject of criminal law had been somewhat affected by the English law ; and the departures from the rules of the English law which the Committee recommended were founded on this ground, that many of the prominent parts of the English law were based on political considerations, the object of those familiar rules of criminal law being not to bring the criminal to justice, but to protect the people from a tyrannical Government, and the functions of juries of the people having been for many centuries principally directed to the protection of the interests of the people. Not only were those provisions now unnecessary in England, but they were especially out of place in a country where it was not pretended that the subject enjoyed that liberty which was the birthright of an Englishman ; and it was not intended to introduce rules into the criminal law which were designed with the object of securing the liberties of the people. That being so, his Honour thought they might fairly get rid of some of the rules, the object of which was to secure for the people that jealous protection which the English law gave to the accused. It seemed to him that they were not bound to protect the criminal according to any code of fair play, but that their object should be to get at the truth, and anything which would tend to elicit the truth was regarded by the Committee to be desirable for the interests of the accused if he was innocent, for those of the public if he was guilty. That being so, he would say that he had no sympathy whatever for some of those things which his honourable friend, Mr. Stephen, had called superstitions. For instance, his Honour did not see why they should not get a man to criminate himself if they could ; why they should not do all which they could to get the truth from him ; why they should not cross-question him, and adopt every other means, short of absolute torture, to get at the truth."

(224) 194. If, from the absence of a witness or from
Adjournment of in- any other *reasonable cause*, it becomes
quiry and remand. necessary or advisable to defer the examination, or further examination, of witnesses, the Magistrate may, by a written order, from time to time adjourn the inquiry, *and remand* the accused person for such time as is deemed reasonable, *not exceeding fifteen days* :

Instead of detaining the accused person in custody during the period for which he is so remanded, the Magistrate may release him, upon his entering into a recognizance, with or without a surety or sureties, at the discretion of such Magistrate, conditioned for his appearance before such Magistrate at the time and place appointed for the continuance of such examination.

Explanation.—After commencing the inquiry, if sufficient evidence has been obtained to raise a suspicion that the person accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable ground for a remand.

Reasonable cause.—If the proceedings have been completed against a prisoner, the decision of the case should not be deferred merely because they are *subordinate* prisoners, and because the *principal* offenders have not been apprehended; a trial should be adjourned only when there is a probability of obtaining additional evidence against an accused. If, in another case, a prosecution for giving false evidence has been instituted, proceedings should not be stayed because the original case in which the false evidence was given was on appeal. The order of an Appellate Court could not affect any prosecution for such an offence (5 R. J. P. J., 100).

In *Mathoor Nath Chuckerbutty* (17 W. R., 55), Couch, C. J., said: "That without proper cause it was not lawful for a Magistrate to adjourn an inquiry, and that where a Magistrate had so acted, the High Court could, under Section 15 of the Act under which the Court was established, deal with the case." The words *reasonable cause* will, doubtless, be fully ruled by the several High Courts before the present Act is much older.

Remand not exceeding fifteen days.—The order of a Magistrate sanctioning the detention by the Police of an accused person for an indefinite period is illegal. At the expiration of twenty-four hours from the time of arrest, the accused *must* be brought before a Magistrate, who can then remand for a period not exceeding fifteen days under this section. No remand without a hearing can last for a longer period (*Reg. v. Surkya*, 1 Bom. H. C. R., vol. v, p. 31).

(225) 195. When a Magistrate finds that there are not sufficient grounds for committing the accused person to take his trial before the Court of Session or High Court, or for remanding him, he shall discharge him, unless it appears to the Magistrate that such person should be put on his trial before himself, in which case he shall proceed under Chapters XVI, XVII, or XVIII of this Act.

When accused person to be discharged.

Explanation 1.—The absence of the complainant, except when the offence may lawfully be compounded, shall not be deemed sufficient ground for a discharge, if there appear other evidence of a nature rendering a trial desirable.

Explanation 2.—A discharge is not equivalent to an acquittal, and does not bar the revival of a prosecution for the same offence.

Explanation 3.—An order of discharge cannot be made

until the evidence of the witnesses named for the prosecution has been taken.

Amendment 14 of 1874.—In Section 195, Explanation III, for the word “cannot,” the words “shall not ordinarily” shall be substituted.

The explanations to this section include all the rulings of any importance issued as to its construction. And Section 296, *post*, provides for the accused's being committed for trial by order of the Sessions Court or Magistrate of the District, if he has been improperly discharged by a subordinate Court; and the provisions of Section 297, *post*, the powers of the High Court as to revision, ordering commitment, altering finding and sentence, annulling conviction, and passing proper sentence, reducing or enhancing sentence, and suspending sentence.

If the offence is one that the Magistrate is competent to try, he can try the prisoner under any chapter which is applicable; he is not now tied down, as he formerly was, to the alternative of a warrant trial.

(226) 196. When evidence has been given before a Magistrate which appears to justify him in sending the accused person to take his trial for an offence which is triable exclusively by the Court of Session or High Court, or which, *in the opinion of* the Magistrate, is one which ought to be tried by such Court, the accused person shall be sent for trial by such Magistrate before the Court of Session or High Court, as the case may be.

When accused is to be committed for trial.

In the opinion of.—The duty of a committing officer is to ascertain whether by the evidence for the prosecution a *prima facie* case is made out against the accused; where in the opinion of the Magistrate there is sufficient ground for putting the accused on his trial, the Magistrate should make a commitment: he thereby discharges all the duty imposed on him by law.

This section contains the provisions of the old Section 226, Act XXV of 1861. The wording is slightly altered; the old law had it, “when evidence has been given which appears to be sufficient for the conviction of the accused.”

A Magistrate can commit a person who appears before him by agent (C. H. C., March 21st, 1865).

197. If such accused person (not being a European British subject)

When commitment to be to a High Court.

Is accused of having committed an offence conjointly with a European British subject who is about to be *committed for trial*, or to be tried, before the High Court on a similar charge,

And the evidence appears to justify the Magistrate in sending the accused person for trial,

He shall commit such accused person to take his trial

before such High Court and not before a Court of Session ; and such High Court shall have jurisdiction to try such person.

Explanation.—A commitment once made by a competent Magistrate can be quashed by the High Court only, and only on a point of law.

This explanation applies also to Section 196.

This section is a new section added to the C. C. P. by the present Act X of 1872.

The principle here laid down has already been adopted in Act XIII of 1869. This section merely enlarges the limits enjoined by that Act, treating this principle as generally applicable all over British India.

Committed for trial.—Meaning of as given in the Public Prosecutors Act of 1872. Where a reference is made in this Act to a person committed for trial, such reference shall be deemed to refer also to a person who has given bail to appear and take his trial, or to answer to an indictment, or is ordered to be detained in custody, until removed for the purpose of his trial ; and also, unless the context otherwise require, to a person who has been committed, bailed, or ordered to be detained in consequence of an inquisition before a coroner.

He shall commit, &c.—And considering what has lately transpired *in re R. v. Vigors and Anderson*, the provisions of this section have not been enacted any too soon. As the law originally stood, where Europeans and Natives committed an offence conjointly, the Magistrate could punish the Native himself, whereas he was bound to commit the European British subject to the High Court. The law as it now stands says, “he *shall* commit” the Native to the High Court. Politically, it is most desirable to prevail upon Englishmen in India to abandon of their own free will race privileges to which they so tenaciously cling, and if the provisions of this section do nothing more than put an end to the unedifying spectacle of persons of one colour being convicted and punished by a subordinate Court, consisting of one individual, on the very same evidence which a higher Court, more experienced, more learned, and aided by an intelligent jury, rejects as worthless or false, it will be of no small value. The rule to be observed henceforth is, that when several persons are charged with different offences arising out of one act or transaction, one or more of which are beyond the cognizance of the Magistrate and the next within his cognizance, he should not punish the offenders within his cognizance himself and commit the others, but commit the whole of them to the Sessions Court.

(233) 198. When the Magistrate determines to send the accused person before the Court of Session
Contents of charge. *or High Court* for trial, he shall, *after the evidence has been recorded*, make a written instrument under his hand and seal, declaring with what offence the accused person is charged, and shall direct him to be tried

by such Court on such charge. *He shall also record his reasons for committing such accused person.*

A copy of such instrument shall be forwarded with the record of the original inquiry to the Court of Session before which the accused person is to be tried, and a copy shall also be sent to the public prosecutor or to the officer appointed to conduct the prosecution.

Copy of charge.

Any weapon or other article of property necessary to produce in evidence shall also be transmitted to the Court of Sessions.

When a commitment is made to the High Court, such instrument, record, and such weapon or other article shall be forwarded to the Clerk of the Crown or other officer appointed by the Court, and if any part of such record is not in English, a translation thereof in English shall be forwarded therewith.

The words in this section printed in italics have been added to the body of the Code by the present Act, as also the two last paragraphs of this section.

A Session Judge should amend before trial all charges which require alteration.

The charge as amended by the Session Judge must still be drawn in the name of the committing officer (H. C., Madras Pro., 30th August, 1862).

The several counts of a charge should always be referred to as the first head of charge, the second head of charge, and so on (H. C., Madras Pro., 19th December, 1866).

Persons against whom offences are committed are to be described in charges by their names and not by their accidental positions as prosecutors or witnesses in the particular trial (H. C., Madras Pro., 28th February, 1865). In framing a charge of dacoity, the charge should be that the prisoner, conjointly with four or more others, committed robbery, and has thereby committed dacoity (H. C., Madras Pro., 23rd November, 1863).

A previous conviction should be made a separate head of charge on the trial for the subsequent offence. The prisoner should, in the first instance, be arraigned only upon the charge for the subsequent offence, and after conviction, or a plea of guilty, he should be asked whether he has been previously convicted as alleged. If he denies that he has, then evidence should be given of the previous conviction; and if there be a jury, the jury should be charged to decide. If, however, the party charged should, in the course of the trial for the subsequent offence, examine witnesses to his good character, evidence of the alleged previous conviction may be given in answer before his conviction for the subsequent offence (H. C., Madras Pro., 23rd November, 1863).

When the charge is founded upon one single continuous transaction, the first point for consideration is the principal legal offence involved. This should form the first head of the charge. The object of adding other counts is not the accumulation of punishment, but to provide against the event of the evidence failing to support the principal charge (H. C., Madras Pro., 30th March, 1863).

Where two contradictory statements have been made on oath or solemn affirmation, and it is doubtful which of those two statements is false, perjury may be charged upon each of the contradictory statements, and the finding may be in the alternative (Judgment in Cr. Pet., 225 of 1867). *Vide* Part X, Chapter XXXIII, Sections 439 to 460, *post*.

When the extent of punishment awardable for an offence under a special or local law is such as would render a formal charge necessary under the Penal Code, a formal charge should be framed.

(227) 199. As soon as the charge on which the accused person is to be tried has been prepared, it shall be read and explained to him, and a copy or translation thereof shall be furnished to him, if he so require.

Copy of charge to be furnished to accused.

(227) 200. The accused person shall be required at once to give in, orally or in writing, a list of witnesses, whom he wishes to be summoned to give evidence on his trial before the Court of Session or High Court.

List of witnesses for defence on trial.

The Magistrate may, if he thinks proper, summon the persons so named to attend and give evidence at the inquiry; and if he does so, the commitment shall not be considered to have been made until such evidence has been taken.

It shall be in the discretion of the Magistrate, subject to the provisions of Section 359, to allow the accused person to give in any further list of witnesses at a subsequent time.

Further list.

Further list.—The second paragraph of this section has been added to the provisions of the C. C. P. by the present enactment, and is a blow at concocted defences.

(230) 201. When the inquiry is concluded, the accused person shall, if he demands them at a reasonable time before the trial, be furnished with copies of the depositions. *Such copies shall be made at his expense unless the Magistrate see fit to give them free of cost.*

Copies of depositions to be furnished to accused.

Such copies shall be made, &c.—The copies herein mentioned may be on unstamped paper, but must be signed by the Magistrate (M. S. P., 1862). The rate chargeable has been fixed by Sch. I, Art. 9, Act VII of 1870, at eight annas for every three hundred and sixty words or fraction of three hundred and sixty words. It is optional with the Magistrate, if he sees fit, to give the copies free of cost : under the law as it originally stood, the accused could only get copies by paying for them. But the *application* for such copies must be made on a one-anna stamp paper. (Act VII, 1870, Schedule II, Art. I (a).)

(231) 202. When the accused person is committed to take his trial before the Court of Session or High Court, the Magistrate shall issue an order to the public prosecutor, Government pleader, or other person appointed by the Government to conduct prosecutions before the Court of Session or High Court, notifying such commitment and stating the offence in the same form as the charge.

Nothing in this section shall preclude the Magistrate of the District in a case committed to the Court of Session, if he thinks fit, from appointing a person other than such Government pleader or person to conduct the prosecution.

Amendment 15 of 1874.—To Section 202, clause first, the following words shall be added (namely) :—

“unless the Magistrate is satisfied that such Government Pleader or other person is already aware of the commitment and the form of the charge.”

CHAPTER XVI.

OF THE TRIAL OF SUMMONS CASES BY MAGISTRATES.

This chapter contains the provisions of Chapter XV, Act XXV of 1861, as amended by Act VIII of 1869, Sections 258 to 272. The law has been so far altered by the present enactment, that now the Magistrate, if he finds that the case is not one coming under this chapter, can proceed under the chapter applicable to such case (see Section 203, Clause 2 ; also Section 206).

Procedure in summons cases. 203. The following procedure shall be observed in the trial of summons cases.

No formal charge need at any time be made against the accused person, and neither the complaint nor the summons shall be regarded otherwise than as notice to the accused person of the facts to be inquired into. The Magistrate may convict the accused person of any offence (coming under this chapter) which, from the facts proved, he appears to have committed, whatever may be the nature of the complaint or summons.

Object and effect of complaint.

No defect in the complaint or summons shall affect the validity of the proceedings unless it appears that the accused person was actually misled by such defect; and in considering whether or not he was so misled, the Court shall have regard to the manner in which the accused person conducted his defence.

When notice is defective.

(258) 204. If upon the day appointed, the accused person appears voluntarily in obedience to the summons in that behalf served upon him, or is brought before the Magistrate by virtue of a warrant *or otherwise*, it shall be at the discretion of the Magistrate to admit him to bail, or allow him to be at large upon his personal recognizance, as the Magistrate directs.

Accused person may be admitted to bail or allowed to be at large on his personal recognizance.

If the accused person cannot give *bail*, when required to do so, he shall be committed to custody.

The words "*or otherwise*" have been added to this section by the present Act, so that now, however the accused is produced, the Magistrate can proceed under this section.

Bail.—The bail-bond here alluded to is by Act VII of 1870, Clause 15, Section 19, exempted from stamp duty.

(259) 205. If upon the day appointed for the appearance of the accused person, or any day subsequent thereto on which the case may be called on, *the complainant does not appear*, the Magistrate *shall dismiss the complaint*, unless for some reason he thinks proper to adjourn the hearing of the same to some other day. Such adjournment shall be made upon such terms as the Magistrate thinks fit.

Non-appearance of complainant.

The complainant does not appear.—Where a complainant allows a com-

plaint to be dismissed by default, it cannot be revived (1 W. R. 25, *in re* Jadhoo Beharee. Full Bench ruling C. H. C.). But where such default is caused by the Magistrates moving about in camp, to dismiss the case would be an irregularity, such as holding of a Court in a place other than that mentioned in the summons, and under such circumstances the case should undoubtedly be revived.

Shall dismiss the complaint.—This section not merely authorizes but requires the Magistrate to dismiss the complaint upon default by the complainant, unless for some reason the Magistrate may think fit to adjourn the hearing.

(265) 206. On the appearance of both parties, on the day fixed for the trial, the substance of the complaint shall be stated to the accused person, and he shall be asked if he has any cause to show why he should not be convicted.

If the accused person admit the truth of the complaint, *his admission shall be recorded*, and if he shows no sufficient cause why he should not be convicted, the Magistrate may convict him accordingly of such offence (coming under this chapter) as he may appear to have committed.

By the provisions of the law as it now stands, the accused's admission must be recorded: this, though it was usually done under the old law, was not clearly laid down as essential. It must be borne in mind that the offence of which the Magistrate may thus summarily convict is *one coming under this chapter*; if the accused confess to having committed an offence other than one coming under this Chapter XVI, he cannot be dealt with under the provisions of this section.

"When under the provisions of Section 206 or 218, an accused person is called upon to make his defence, if such accused person is undefended by competent counsel, or is evidently not a hardened offender conversant with the usages of our courts, it is highly desirable that the trying officer should explain the strong points against him, and ascertain whether he fully comprehends them, in order to give him a fair opportunity of rebutting or refuting the charge. To such a man as is above described, the whole procedure of our courts is a mystery. He is too ignorant or too bewildered to comprehend the links in the chain of circumstances which support the case for the prosecution, and on being called on for his defence blindly refers to 'Khuda' or to the 'Huzoor.' Whereas, if the points were explained to him, he might perhaps be able to show that they were not incompatible with his innocence."

Under this section the Magistrate can accept the written defence tendered by the accused, and need not himself record such defence (Debee Mundul, 16 W. R., 63).

(266) 207. If the accused person do not admit the truth

of the complaint, the Magistrate shall proceed to hear the complainant *and such witnesses as he produces* in support of his complaint, and also to hear the accused person and such witnesses as he produces in his defence.

Procedure when no such admission is made.

And such witnesses as he produces.—This and the preceding section must be read together; accordingly, this section supposes “both parties to be present on the day fixed for the trial;” accordingly, the witnesses here alluded to are brought face to face with the accused. Her Majesty’s Commissioners were asked with reference to this section—Whether, in cases which are not of a grave nature, and are punishable only with imprisonment for a period not exceeding six months, the examination of witnesses ought to be allowed to take place in the absence of the accused person under trial? It was urged upon the Committee of Council “that it had been held that the language of this and other sections made it doubtful whether the Code contemplated that all witnesses in petty cases coming under Chapter XV of Act XXV of 1861 should be examined in the presence of the accused person; and that at the same time it was considered desirable that some provision should be made for examining absent witnesses by a summary procedure, without summoning them to the place where the trial is being held.” Her Majesty’s Commissioners say, “We are of opinion that no sufficient cause has been assigned for departing from the usual course of not convicting an accused person except on the testimony of witnesses examined in his presence” (Law Commissioners’ 7th Report of 11th June, 1870).

(269) 208. Before or during the hearing of any complaint, the Magistrate may, in order to secure the attendance of witnesses *or for any other reason*, adjourn the hearing of the same *to a day to be then appointed and stated in the presence and hearing of the party or parties.*

Adjournment.

If on the day to which such hearing or such further hearing has been so adjourned, the accused person does not appear, the Magistrate may issue his warrant for the arrest of such person.

If the complainant does not appear, the Magistrate may *dismiss the complaint.*

For any other reason.—*Vide* note under Section 194, *ante*, in *re* Mathorora Nath Chuckerbutty.

To a day to be appointed, &c.—This chapter deals with the trial of summons cases, and the adjournment in such cases has no limit fixed to it by law, like an adjournment in the trial of warrant cases (214) or inquiries (194).

Dismiss the complaint.—No appeal lies from such an order (*vide* Section 286, *post*).

(270) 209. A Magistrate may dismiss the complaint as *frivolous or vexatious*, and may, in his discretion, by his order of dismissal, *award* that the complainant shall pay to the accused person *such compensation*, not exceeding fifty rupees, as to such Magistrate seems just and reasonable.

In such cases, if more persons than one are accused in the complaint, the Magistrate may in like manner award compensation not exceeding fifty rupees to each of them.

The sum so awarded shall be recoverable by distress and sale of the moveable property belonging to the complainant, which may be found within the jurisdiction of the Magistrate of the District, and such order shall authorize the distress and sale of any moveable property belonging to the complainant without the jurisdiction of the Magistrate of the District when the order has been endorsed by the Magistrate of the District in which such property is situated, and if the sum awarded cannot be realized by means of such distress, by imprisonment of the complainant in the civil jail, for any time not exceeding thirty days, unless such sum is sooner paid.

Award, &c., such compensation.—The compensation or award which a Magistrate, who dismisses a complaint as frivolous and vexatious, is empowered in his discretion to award to an accused person, does not deprive the latter of any right of suit in the Civil Court which he may possess. This section does not, like Section 79, Civil P. C., provide that the award of compensation shall bar a suit for damages (H. C. N. W. P. Report, vol. ii, Part II, p. 58). An order refusing to grant compensation, or refusing to grant an enhanced award, is not open to appeal (*vide* Section 286, *post*).

Frivolous or Vexatious.—The Punjab Chief Court, *in re Alla Ditta v. Shere Mahomed*, held that amends are awardable to an accused under this section in the case of a frivolous and vexatious complaint under a special Act, such as Act I of 1871 (Cattle Trespass Act), (7 P. R., 1).

The present Act might, I think with advantage, have gone further than it has done. The object of the framers of the Code of Criminal Procedure in framing this section was, undoubtedly, to discourage frivolous or vexatious complaints by mulcting the complainant in a fine, and handing this over as amends to the accused. It was ruled by the Calcutta High Court, under the original Section 270, Act XXV of 1861, that a Magistrate

finding the complaint to be false, "as well as frivolous and vexatious," was precluded from awarding amends,—a false charge being a warrant case, and punishable with more than six months' imprisonment; and Section 270, Act XXV of 1861, referred only to summons cases; hence this provision of the Code was by such a restriction made almost a dead letter. The High Court Ruling restricting the interpretation of this Section 270 of Act XXV of 1861, arose apparently from the peculiar arrangement of the original C. C. P. The opportunity of re-enacting the Code of Criminal Procedure might have been taken to give effect to the obvious intention of the framers of the original Code, and to have so worded this section as to render it unsusceptible of such an interpretation as that placed on it by the High Court of Calcutta, and to have freed it from its passive, useless, inoperative position. This would practically have tended to strengthen the hands of the Magistracy. The essence of a frivolous and vexatious complaint is exaggeration, or, in other words, its not being quite the truth. If the principle is right that a man bringing against his neighbour a vexatious complaint of assault, ought to be fined for so doing, *à fortiori* if he brings a vexatious complaint of hurt, which is a graver offence; but the ruling of the High Court precludes such procedure *because* hurt is a warrant case punishable with more than six months' imprisonment. Why cramp the clear meaning of plain words by such technical subtleties? For the natives, perceiving the state of the law, never accuse one another of assault, while they can do so of hurt, and so on. So that if an accused is prosecuted by being charged with a frivolous or vexatious complaint tinged with falsehood, his only remedy is prosecuting his prosecutor under Section 211, I. P. C., where he has to prove a negative, and to do so spend time, money, and trouble, and probably gain nothing by it. Better omit this section than parade its corpse for knaves to practice their acuteness on, and laugh at its impotency.

From the several High Court Rulings, the following principles may be noted with reference to the provisions of this section:—

(1.) Compensation can be awarded only in summons cases; and when the Magistrate dismisses the case, not when he allows it to be withdrawn.

(2.) If the complaint contains various charges, some coming under this chapter (XVI) and some under the following chapter (XVII), still compensation may be awarded in the summons cases. (On this point the Rulings of the Calcutta and Bombay High Court do not coincide.)

(3.) The Magistrate need not wait until a charge is made against the complainant, but may of his own accord by his order of dismissal of the complaint fine the complainant.

(4.) It is optional with the Magistrate to allow the accused to prosecute the complainant under Section 211, I. P. C.

(5.) There is no appeal.

(6.) An order under this is no bar to a prosecution under Section 211, I. P. C.

Under the law as it now stands, the Magistrate can authorize the distress and sale of any movable property belonging to the defendant in another district, when the order has been endorsed by the Magistrate of the District in which such property is situate. The old law did not confer this power.

(271) 210. If a complainant at any time before a final order is passed in any case under this chapter satisfies the Magistrate that there are sufficient grounds for permitting him *to withdraw his complaint*, the Magistrate may permit him to withdraw it.

Withdrawal of complaint.

A complaint withdrawn under this section shall not again be entertained.

To withdraw his complaint.—All cases under the purview of this chapter, may, under this section, be admitted to compromise. There are some other cases, such as adultery, which the law expressly permits to be compromised; but cases generally which do not come under this chapter cannot be withdrawn under this section; and if the complainant, owing to some private settlement out of Court, is unwilling to proceed in the case, it should be called up and dismissed, the charge not being proved (11 W. R., Cr. L., p. 2).

“Though an offence relating to marriage may be compounded out of Court, and the parties do not by such composition commit an offence punishable under the Penal Code, as they would do for compounding any offence not falling within the exception to Section 214, I. P. C., yet as offences relating to marriage do not come within the provisions of Chapter XV, C. C. P., the Magistrate cannot permit a case of the kind to be withdrawn under the provisions of this section; but he should proceed with the case, and if no one appears, or if any one appearing declines to prosecute, the Magistrate should dismiss the case” (C. H. C. 122 of 1868).

“The question of what cases can be compromised under this section is one of procedure. A compromise under this section is a settlement of the case sanctioned by the Court, and having the effect of barring all further proceedings, and for obvious reasons it is limited to those cases which involve petty offences only” (C. H. C. 1339 of 1867).

The Bombay High Court has approved of the withdrawal of a charge of adultery by the prosecutor, even after the case had been committed for trial before the Court of Sessions (*R. v. Rambo Jerio*, 5 Bo., 27).

The distinction between the power of withdrawing a charge of an offence and compounding an offence should be clearly borne in mind. A person may out of Court compound an offence which consists only of an act irrespective of the intention of the offender, and for which the injured person may bring a civil action, as assault, adultery, illegal confinement, &c. (Exception to Section 211, Penal Code), without rendering himself liable to the punishment prescribed by the Penal Code for compounding offences not falling within the exception to Section 214 of the same; but if a complaint be made in Court of an offence, the procedure for which is not laid down in this chapter, no matter whether it comes within the exception above quoted or not, it cannot be withdrawn on a compromise (1 W. R., C. L., 1; 9 *ibid.*, 2, 4).

See notes under Section 188, *ante*.

(272, 261) 211. If the Magistrate, in any case tried under this chapter, finds the accused person not guilty, he shall record a judgment of acquittal.

Acquittal. If the accused person is convicted, the Magistrate shall pass sentence upon him according to law.

Sentence. When the personal attendance of the accused person during the trial has been dispensed with, the sentence of the Magistrate, if the sentence be for fine only, may be pronounced in the presence of the agent, if he has been permitted to appear by agent, or the accused person may be required to attend to hear such sentence.

With reference to Section 211, attention is drawn to the provisions of the sixth chapter of the Court Fees Act, under which, if a person is convicted of an offence other than offence for which Police Officers may arrest without warrant (Section 92), the Court must order him to repay the fee paid by the complainant, on preferring his petition or on having his complaint reduced into writing, as the case may be. Officers will observe that it is compulsory on them to direct the accused person to repay the fee paid by the complainant (52 J. C. O., Pref.).

212. The dismissal of a complaint under this chapter shall operate in like manner as the acquittal of the accused person.

Effect of dismissal.

No complaint shall be dismissed under the provisions of this chapter except in so far as it refers to a summons case.

CHAPTER XVII.

ON THE TRIAL OF WARRANT CASES BY MAGISTRATES.

This chapter contains the provisions of Chapter XIV, Act XXV of 1861, as amended by Act VIII of 1869, Sections 250 to 256.

213. The following procedure shall be observed by Magistrates in the trial of warrant cases.

Sections 190 to 194 to apply. (249) 214. The provisions of Sections 190 to 194 (both inclusive) shall apply to trials conducted under this chapter.

Section 328 deals with the procedure in a case where evidence has partly been recorded by one Magistrate and partly by another.

(250) 215. When the evidence of the complainant and of the witnesses for the prosecution, and such examination of the accused person as the Magistrate considers necessary, have been taken, the Magistrate, if he finds that no offence has been proved against the accused person, shall discharge him.

Explanation 1.—The absence of the complainant, except where the offence may be lawfully compounded, shall not be deemed sufficient ground for a discharge, if there appears other evidence sufficient to substantiate the offence.

Explanation 2.—A discharge is not equivalent to an acquittal, and does not bar the revival of a prosecution for the same offence.

Explanation 3.—An order of discharge cannot be passed until the evidence of the witnesses named for the prosecution has been taken.

Only the High Court can order the retrial of an accused improperly discharged under this section. (*Vide* Section 297, *post*.)

(250) 216. If the Magistrate finds that an offence is apparently proved against the accused person, which such Magistrate is competent to try, and which, in his opinion, could be

Charge to be drawn when offence is apparently proved.

adequately punished by him, he shall prepare in writing a charge against the accused person.

Explanation 1.—The omission to prepare a charge shall not invalidate the trial, if, in the opinion of the Court of appeal or revision, no failure of justice has been occasioned thereby.

Explanation 2.—If the Court of appeal or revision thinks that a failure of justice has been occasioned by an omission to prepare a charge, it shall order the trial to be recommenced from the point at which the charge should have been drawn up.

Amendment 16 of 1874.—To Section 216, the following explanation shall be added (namely):—

“EXPLANATION III.—The charge shall be prepared as soon as the Magistrate is of opinion that a *prima facie* case has been established against the accused person, although the whole of the evidence for the prosecution may not have been completed.”

As the Code stood, the charge could not be drawn until after the witnesses for the prosecution had been heard. Magistrates found this inconvenient; they found themselves obliged to take a quantity of unnecessary evidence. The Magistrates are now given a discretion, and it is left to them to judge for themselves when it is proper to frame a charge.

In framing his charge the Magistrate is not bound down to the offences noted in the complaint. To so restrict the Magistrate would be to hamper justice. The complainant, in ninety-nine cases put of a hundred, is ignorant of the law; that is, of the specific section of the Penal Code which covers the wrong committed against him. He is well aware of the fact that he has been wronged, and all he seeks at the hands of the Court is redress: he cares little under what section of the Penal Code the accused is punished; the technical subtleties of theft or criminal misappropriation are unknown to, and wholly uncared for, by him. The petition writer who wrote his complaint for a few annas, is probably quite as ignorant as himself. The probabilities are, that in three out of every five cases, the evidence discloses an offence very different from that stated in the petition of complaint. Still, if an offence has been committed, the Magistrate is not only competent, but bound in the cause of justice, to inquire into and proceed against the accused with regard to the offence so disclosed.

(251) 217. *The charge shall then be read and explained*
to the accused person, and he shall be
Plea. asked whether he is guilty or has any
defence to make.

The charge shall then be read and explained.—Where no charge in writing has been drawn up, and the prisoner has not been asked to make his defence, the Magistrate, if he thinks that no offence has been proved,

can only *discharge*, and not *acquit* the prisoner. Nor can a Magistrate acquit a prisoner when he has no jurisdiction to try (Cr. R., 6 W. R., p. 13).

It is not illegal for a Magistrate to commit an accused to the Sessions without examining him or his witnesses. The Magistrate, when he has prepared the charge, is bound to read and explain it to the accused, and to ask him if he wishes to have any witnesses summoned to give evidence on his behalf at the Sessions (Cr. R., 2 W. R., p. 50).

In a case of causing grievous hurt to B, the prisoner, on having the charge read to him, made a statement in which he stated that he had had a quarrel with B, and struck him twice with a stick in anger: *Held*, that the Sessions Judge was wrong in treating this statement as a plea of guilty and convicting thereon (11 W. R., Cr. R., p. 6).

The evidence of guilt, derived from criminative statements, may be either of a direct or presumptive nature (3 Benth., J. E. 102). Where guilt is avowed in language which, if believed, leaves no room for doubt or inference, the statement is substantially the deposition of a witness to the physical facts which form the basis of the charges, accompanied by an avowal of the psychological part by the person who, of all others, has the strongest interest to conceal it. Confessions of this kind are said to be full, direct, or plenary (*id.*, 107). But where the words do not necessarily impart guilt, the criminative inference from them is of the nature of presumptive evidence; ambiguous expressions, although they may be consistent with an intention to avow guilt, are equally so with an expression of regret that circumstances should have so occurred to induce unjust suspicion on the speaker. Judicial confessions of guilt are sufficient to found a conviction, even if to be followed by a sentence of death, they being deliberately made under the deepest solemnities with the advice of counsel, and the protecting caution and oversight of the Judge. Such was the rule of the Roman law "*Confessos in Jure, pro judicatis haberi placet*;" and it may be deemed a rule of universal jurisprudence (Greenl. L. E., 250; Phil. E., 8th ed., 419). Still, if the confession appear incredible, especially if there are no traces to be found of a *corpus delicti*, or it is manifest that the prisoner has some collateral object in view to induce him to make a false one, the Judge ought not to receive it. So if it appear to be made in consequence of a promise of leniency or a threat of punishment, &c. (Best L. and F., p. 327).

(252) 218. If the accused person have any defence to make to the charge, he shall be called upon *to enter upon the same*, and to produce his witnesses if in attendance, *and shall be allowed to recall and cross-examine the witnesses for the prosecution*.

If the accused person puts in any written statement, the Magistrate may file it with the record, but shall not be bound to do so.

To enter upon the same.—A Magistrate is not bound to file with the record any written defence which the accused may wish to have recorded, and where several persons are tried together, the defence of each person must be separately recorded. The mere irregularity on the part of the presiding officer of not drawing up a formal charge is not sufficient to quash a conviction, if accused heard the evidence for the prosecution, and was aware of what offence he stood accused; but it is necessary for the Magistrate to record the charge and proceed under either of the two preceding sections.

And shall be allowed to recall, &c.—From the wording of this section it appears that the counsel for the accused can go in for *two* cross-examinations of the witnesses for the prosecution, viz. (1.) Before the charge is

framed, and (2) after the charge is framed. The Magistrate could not prevent counsel for the accused cross-examining the witnesses for the prosecution after their evidence in chief had been taken. This having been done, and the charge framed, this section distinctly allows the witnesses for the prosecution to be recalled and cross-examined. The law on this point might easily have been made a little clearer. Doubtless a ruling of some of the High Courts will shortly give Magistrates a precedent to follow until the next amendment of the Code.

The last paragraph to this section has been added to the Code by the present enactment, Act X of 1872. (*Vide* note under section 206, *ante*.)

(253) 219. The Magistrate *shall*, subject to the provisions of Section 362, *summon* any witnesses *and examine any evidence that may be offered* in behalf of the accused person, to answer or disprove the evidence against him, and may for this purpose, at his discretion, adjourn the trial from time to time, as may be necessary.

Evidence for the
defence.

Shall summon.—(*Vide* the provisions of Sections 359 and 362, *post*, and notes thereto.)

And (shall) examine.—If the witnesses are present or produced by the accused, the Magistrate has no option in the matter; he must examine them. Sections 359 and 362, *post*, refer to summoning absent witnesses, and not to present witnesses. Not to examine present witnesses is clearly to prejudice the accused's case, and call for the interference of the High Court.

(255) 220. If the Magistrate finds the accused person not guilty, he shall record judgment of acquittal. If the accused person *is convicted*, the Magistrate *shall pass sentence* upon him according to law.

Acquittal.

Conviction.

Explanation.—If a charge is drawn up, the prisoner must either be acquitted or convicted. If no charge is drawn up, there can be no judgment of acquittal or conviction, except in the case provided for in Explanation 1 to Section 216.

Is convicted . . . shall pass sentence.—If the accused is convicted, the Magistrate must pass some sentence on the accused. It may be merely an hour's imprisonment, or the fine of one pie. He cannot just warn him and then discharge him (3 W. R. C. L., 15).

Records of a previous conviction should be put in as evidence after conviction and before sentence (W. R. C. R., 38).

The law of England does not allow general character to be adduced, in the first instance, in evidence as a criminative circumstance. It requires facts of a more proximate nature, among the foremost of which are

motives, means, and opportunities, on the part of the accused to commit the offence charged ; nevertheless, in all cases where the direct object of the proceedings is to punish the offence, such as indictments for treason, felony, or misdemeanours, and is not merely for the recovery of a penalty, the character of the accused may be put in issue, and it is competent for the accused to defend himself by proof of previous good character, reference being had to the nature of the charge against him. If the accused sets up his character as an answer to the charge against him, he puts it in issue, and the prosecutor may encounter his evidence either by cross-examination or contrary testimony (2 Stark. E., 304, 3rd ed.). But as it is not competent for the prisoner to show particular acts of good conduct, the prosecutor cannot go into particular cases of misconduct : an exception to this rule has been established by 6 and 7 Will. IV, c. 3 (Best L. and F., pp. 213, 216).

(256) 221. In any trial before a Magistrate, in which it may appear at any stage of the proceedings that from any cause the case is one which the Magistrate is not competent to try, or one which, in the opinion of such Magistrate, ought to be tried by the Court of Session or High Court, the Magistrate shall stop further proceedings under this chapter, and shall, when he either cannot or ought not to make the accused person over to an officer empowered under Section 36, commit the prisoner under the provisions hereinbefore contained. If such Magistrate is not empowered to commit, he shall proceed under Section 45.

How the Magistrate is to proceed when, after commencement of trial, he finds the case beyond his jurisdiction.

Under Section 256 of the old Code, the section corresponding with this Section 221, it was ruled, that if a number of persons were charged together, all concerned in the same transaction, though in different degrees, and it appeared to the Magistrate that the case against one of the parties was one which he was not competent to try, or one which ought to go to the Court of Session or High Court, he should stop proceedings under this chapter, and (if he could not or ought not to make the accused over to an officer empowered under Section 36, *ante*) commit them all, and not only the *one* whose case he was not competent to deal with.

CHAPTER XVIII.

OF SUMMARY TRIALS.

In this chapter a procedure has been provided for the summary trial of all summons cases, and certain other specified offences. The power to hold summary trials is made inherent in the Magistrate of the District (Section 222), but the Local Government is empowered to invest first-class Magistrates or Benches of Magistrates with all or any of the powers mentioned in this chapter. The chief feature of the summary trial is, that instead of the usual record of the proceedings there will be a mere register in non-appealable cases, and a curtailed record of the evidence in appealable cases. In summary trials held by Magistrates of the first class or Benches of Magistrates exercising first-class powers, there will be no appeal from a sentence of three months' imprisonment or fine, not exceeding two hundred rupees (Section 274). In such cases as those referred to in this chapter, the Courts were grievously overburdened with too bulky and minute a record. The fact was, that the outcry of too little record at the time the original Code of Criminal Procedure was framed, caused the framers to err on the side of too much writing.

222. The Magistrate of the District may try the following offences in a summary way, and, on conviction of the offender, may pass such sentence as may be lawfully inflicted under Section 20 of this Code :—

What offences may
be tried summarily.

- (1.) Offences referred to in Section 148 of this Code.
- (2.) Offences relating to weights and measures under Sections 264, 265, and 266 of the Indian Penal Code.
- (3.) Hurt under Section 323 of the Indian Penal Code.
- (4.) Theft under Section 379 of the Indian Penal Code, where the value of the property stolen does not exceed fifty rupees.
- (5.) Theft under Section 380 of the Indian Penal Code, where the value of property stolen does not exceed fifty rupees.
- (6.) Theft under Section 381 of the Indian Penal Code, where the value of property stolen does not exceed fifty rupees.
- (7.) Receiving stolen property under Section 411 of the Indian Penal Code.
- (8.) Mischief under Section 427 of the Indian Penal Code.

- (9.) House-trespass under Section 448 of the Indian Penal Code.
- (10.) Criminal intimidation under Sections 505 and 506 of the Indian Penal Code.
- (11.) Abetment of, or attempt to commit (when such an attempt is an offence), any of the foregoing offences.

Amendment 17 of 1874.—In Section 222, for paragraph (10), the following shall be substituted (namely) :—

“(10.) Insult with intent to provoke a breach of the peace under Section 504, and criminal intimidation under Section 506 of the Indian Penal Code.”

This chapter contains a most important innovation. It empowers certain Magistrates, under certain circumstances, to try certain common and simple offences in a summary way. The procedure herein laid down is substantially the procedure now followed by the English Courts of Petty Sessions, and by the Police Magistrates in the Presidency towns; and in his speech on the passing of the present Act, the Lieutenant-Governor of Bengal said: “they hoped that in this way they might hit that happy medium in which there should be a record sufficient for the purposes of justice, and not so long as to overburden our officers in keeping it.”

223. The Local Government may invest any Magistrate of the first class with power to try summarily all or any of the offences mentioned in Section 222.

Power to invest Magistrates with power to try summarily.

224. The Local Government may invest any Bench of Magistrates invested with the powers of a Magistrate of the first class, with power to try summarily all or any of the offences mentioned in Section 222.

Power to invest Bench of Magistrates invested with first class magisterial powers.

225. The Local Government may invest any Bench of Magistrates invested with the powers of a Magistrate of the second or third class with power to try summarily all or any of the following offences :—

Power to invest Bench of Magistrates invested with less power.

Offences coming within Sections 277, 278, 279, 285, 286, 289, 290, 292, 293, 294, 323, 334, 336, 341, 352, 426, and 447 of the Indian Penal Code; any offences against Municipal Acts, and the Conservancy Clauses of Police Acts, punishable with fine or with imprisonment not exceeding one month.

226. In trials under this chapter the provisions of this Code in regard to summons cases shall be followed in respect of summons cases, and the procedure for warrant cases in respect of warrant cases, with the exceptions hereinafter provided.

Procedure for summons and warrant cases applicable, with certain exceptions.

227. In cases where no appeal lies, the Magistrate or Bench of Magistrates need not record the evidence of the witnesses nor the reasons for passing the judgment, nor draw up a formal charge, but he or they shall enter in a register, to be kept for the purpose, the following particulars :—

Record in cases where there is no appeal.

- (a.) The serial number ;
- (b.) The date of the commission of the offence ;
- (c.) The date of the report or complaint ;
- (d.) The name of the complainant ;
- (e.) The name, parentage, and residence of the accused person ;
- (f.) The offence complained of or proved ;
- (g.) The prisoner's plea ;
- (h.) The finding, and, in the case of a conviction, a brief statement of the reasons therefor ;
- (i.) The sentence ; and
- (j.) The date on which the proceedings terminated.

228. If a Magistrate or Bench of Magistrates acting under Section 222, 223, or 224, passes a sentence of more than three months' imprisonment, or of fine exceeding 200 rupees ;

Record in appealable cases.

Or, if a Bench of Magistrates, acting under Section 225, convicts any person,

Such Magistrate or Bench of Magistrates shall, before passing sentence, record a judgment embodying the substance of the evidence on which the conviction was had, and also the particulars mentioned in Section 227.

Such judgment shall be the only record in cases coming within this section.

229. Records made under Section 227 and judgments recorded under Section 228 shall be written by the presiding officer either in English or in the language of the district in which the

Language of judgment.

trial was held, or, by direction of the Court to which such presiding officer is immediately subordinate, in the language of the presiding officer.

230. The Local Government may authorize any Bench of Magistrates empowered to try offences summarily to prepare the aforesaid record or judgment by means of an officer of such Court, and the record or judgment so prepared shall be signed by each member of such Bench present conducting the proceedings.

CHAPTER XIX.

TRIAL BY COURT OF SESSION.

(359) 231. No Court of Session shall take cognizance of any offence as a Court of original criminal jurisdiction, unless the accused person has been committed by a Magistrate duly empowered in that behalf, except in the cases referred to in Section 472.

Amendment 18 of 1874.—In Section 231, for “Section 472,” the following words shall be substituted (namely):—

“Section 33, Section 435, Section 472, or Section 474.”

This chapter embodies the law on the subject of Juries, and contains provisions altered in some important points from the law, as contained in Act XXV of 1861; e.g., Section 263, in the Judge differs from the jury, he can send the case for the opinion of the High Court.

These sections, 231 to 265, contain the provisions of Sections 322, 323, 324, 325, 326, 327, 342, 343, 344, 345, 346, 347, 348, and 350, Chap. XXIII of the old C. C. P., and Sections 359, 360, 362, 363, 366, 373, 376, 377, and 378, and certain new sections introduced into the law now for the first time. It is with the person impugning the correctness of the proceedings to show that the jurisdiction was insufficient.

A Sessions Court has no authority to discharge an accused person duly committed. The Court must acquit or convict, however probable it may be that an acquittal may result (9 P. R. Cr. J., 8).

(324) 232. All trials before the Court of Session shall be

Trials to be by jury either by jury, or conducted with the aid
or with assessors. of two or more assessors.

Jurors and assessors are public servants under the provisions of Section 21, I. P. C.

The real object of appointing assessors is to assist the Court, and the discussion and statement of points by a Judge sitting with assessors cannot be said to be otherwise than in furtherance of the object of getting the best assistance for the proper adjudication of the case (*R. v. Ameerooddeen*, 15 W. R., 25).

A Sessions Judge may convict a prisoner, though the assessors acquit him. (*Vide* Section 261, *post.*) If a prisoner plead guilty, the opinion of the assessors need not be taken.

(322) 233. The Local Government, may order that the trial of all offences, or of any particular class of offences, before any Court of Session shall be by jury in any district, and such Local Government may from time to time revoke or alter such order.

Local Government
may order trials before
Court of Session to be
by jury.

Orders passed under this section shall be published in the Official Gazette, and in such other manner as the Local Government from time to time directs.

Explanation.—If an offence triable with assessors is tried by a jury, the trial shall not on that ground merely be invalid. If an offence triable by a jury is tried with assessors, the trial shall not on that ground merely be invalid, unless objection be taken before the Court records its finding.

The present Act makes certain alterations as to trial by jury. Instead of convicting a man, if found guilty by a larger majority of the jury, and trying him again if found guilty by a smaller majority, the concurrence of the Judge is proposed as the condition of the triumph of the majority.

(323) 234. Criminal trials before the Court of Session in which a European (not being a European British subject) or an American is the accused person, or one of the accused persons, shall be by jury.

Jury for trial of Euro-
peans or Americans.

In such case the jury, if such European or American desire it, shall consist of at least one-half of Europeans (whether European British subjects or not) or Americans, if such a jury can be procured :

Provided that, in any district in which the Local Govern-

Election to be tried without jury. ment has not ordered that all trials, before the Court of Session, or trials for all offences of the class within which the trial about to take place falls, shall be by jury, such European or American may elect to be tried without jury.

(360) 235. In every trial before a Court of Session, the prosecution shall be conducted by the *Public Prosecutor*, Government Pleader, or by some other officer specially empowered by the Magistrate of the District in that behalf.

Trial before Court of Session to be conducted by Public Prosecutor, Government Pleader.

The officer specially empowered must, it appears, get his authority from the Magistrate of the District.

(327) 236. In trials by jury before the Court of Session, the jury shall consist of such uneven number, not being *less than three* nor more than nine, as the Local Government, by any general order applicable to any particular district, or to any particular classes of offences in that district, directs.

Number of jury.

Under the old law the number was to be not less than five, by the present Act this has been reduced to three.

(362) 237. When the Court is ready to commence the trial, the accused person shall be brought before it, and the charge shall *be read and explained* to him, and he should be asked *whether he is guilty* of the offence charged, or claims to be tried.

Commencement of trial.

If the accused person pleads guilty, *the plea shall be recorded, and he may be convicted thereon.*

Plea of guilty.

Whether he is guilty.—The plea of the prisoner, or the defensive matter alleged by him on his arraignment, if he does not confess or stand mute, is—

(1.) A plea to jurisdiction, *i. e.*, where an indictment is taken before a Court that has no cognizance of the offence: as if a man be indicted for a rape at the Sheriffs' tourn, or for treason at the Quarter Sessions. In these or similar cases he may take exception to the jurisdiction of the Court, without answering at all to the crime alleged (2 Hale P. C., 256).

(2.) A demurrer—strictly, a *demurrer* is not a *plea*. It is rather an exception taken to the indictment or information in point of law, as a reason why the defendant should not be compelled to plead to its allega-

tions. If, on the demurrer, the point of law be adjudged *for* the defendant, and the objection be on matter of substance, the judgment is that he be dismissed and discharged; if the objection be merely formal, then that the indictment be quashed (1 Chit. C. L., 443, 444). If *against* the defendant, and the indictment be for a misdemeanour or a felony, but not capital—such judgment according to the better authorities is final (2 Hawk. P. C. V., c. 31, s. 7). If capital, accused will be allowed to plead the general issue “not guilty,” after a demurrer determined against him. Demurrers to indictments have been seldom used; but objections at this early stage have been not unfrequently taken in a more summary shape, viz., a motion on the part of the prisoner to *quash* the indictment, a course which in an obvious case the Court allows (1 Chit. C. L., 299).

(3.) A plea in abatement, or dilatory plea, is founded on some matter of fact extraneous to the indictment, tending to show that it is defective in point of form: such a plea principally occurs in the case of a *misnomer*, but in such cases no advantage at all now accrues to the defendant by a plea in abatement by 7 Geo. IV, c. 64, s. 19; and by 14 and 15 Vic., c. 100, s. 24, no indictment shall be held insufficient for want of, or imperfection in, the addition of any defendant (Steph. Com., vol. iv, p. 490).

(4.) A special plea in bar, which goes to the merits of the indictment, and gives a reason why the prisoner ought to be discharged from the prosecution. These are principally of four kinds: a former acquittal, a former conviction, a former attainder, or a pardon.

For *autrefois acquit* and *autrefois convict*, *vide* Section 460, *post*, and notes thereto.

The plea of *autrefois atteint* is also a good plea in bar, depending upon the same principle, and governed in general by the same rules, as the plea of *autrefois convict*. By 7 and 8 Geo. IV, c. 28, s. 4, it is enacted that no plea setting forth any attainder shall be pleaded in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment.

(5.) A *pardon* may be pleaded in bar as at once destroying the end and purposes of the indictment, by remitting that punishment which the prosecutor is calculated to inflict.

(6.) *The general issue, or plea of not guilty.*—This is the proper form, wherever the prisoner means either to deny or to justify the charge in the indictment, and is pleaded by the prisoner *viva voce* at the bar in the words “not guilty.” By the plea of not guilty, the prisoner puts himself upon the trial by jury. (*Vide* Steph. Com., vol. iv, bk. vi, c. 21, pp. 486 to 496.)

The plea should cover the offence, or conviction cannot be had.

Be read and explained.—The charge must be read and explained to accused; if more than one person is accused, the plea of each must be recorded. If a prisoner be charged on several counts, and he pleads guilty to a minor offence, he must still be tried for the graver offence charged. So also in the case of a prisoner charged alternatively, he must be tried on each; it is not for him to elect which charge is the true one. Where several prisoners are charged with separate and distinct offences, they cannot be tried together, but only in cases when they are all charged with being jointly implicated in the commission of an offence. (See

Queen *v.* Challunder Poramanick; Queen *v.* Sheik Bagu, and Criminal Letters, No. 229, March, 1866, No. 732, June 1867, W. R.)

The plea shall be recorded.—A full Bench of the H. C., Calcutta, have ruled that the conviction of a prisoner pleading guilty before a Court of Session under this section, is valid, although there are no assessors (Cr. C. O., No. 1, in 10 W. R., p. 5). The prisoner must *himself* plead to the charge, and not do so through his pleader (15 W. R., 42).

Verdict of the jury is not necessary when the prisoner pleads guilty. It is only when the prisoner "*claims to be tried*" that the verdict of the jury is required (Cr. L., 6 W. R., p. 1); neither is verdict of assessors necessary when prisoner pleads guilty (Cr. L., 6 W. R., p. 3).

The general form of a criminal trial in England is well known. The first step is the prisoner's plea. The theory of pleading is exclusively litigious. It assumes that the trial is a question between the prisoner and the prosecutor. If the prisoner chooses to plead guilty, there is an end of the matter. No further inquiry takes place; no witnesses are called; and the jury is not required to return any verdict. *They are not and cannot be sworn until the issue is joined on which they are to make deliverance.* In France, a man who confesses his guilt is, nevertheless, questioned, the witnesses are examined, the advocates address the jury, and the jury find their verdict (S. C. L. E., 159).

(363) 238. If the accused person refuses to or does not plead, or if he claims to be tried, the Court shall proceed to choose jurors or assessors as hereinafter directed, and to try the case.

Refusal to plead or
claim to be tried.

If the accused *cannot* plead, in consequence of dumbness, and he is not mad, a plea of not guilty should be recorded, and the trial go on. A precedent for this has been laid down by the Bombay High Court.

If the accused plead guilty, it is not absolutely necessary to record evidence for the prosecution, but the Sessions Judge can do so if he thinks proper (H. C. C. 359 of 1862, and 810 of 1863). Where a prisoner pleads guilty, his conviction on that plea is valid, although there are no assessors (*R. v. Sree Kant Charal*, 10 W. R., 43).

(342) 239. When the trial is to be with assessors, the assessors shall be chosen, as the Judge thinks fit, from the persons summoned to act as assessors.

Assessors
chosen. how

Section 265, *post*, says: "The same jury may try, or the same assessors may aid in the trial, of as many accused persons successively as to the Court seems fit." This provision must not be abused to the hardship of intelligent assessors.

(342) 240. When the trial is to be by jury, the jury shall be chosen by lot from the persons summoned to act as jurors.

Jurors to be chosen
by lot.

Vide note under preceding section.

(325) 241. In a trial by jury before the Court of Session of a person not being a European or an American, at least one-half of the jury shall, if the accused person desire it, consist of persons who are neither Europeans nor Americans.

Jury for trial of persons not Europeans or Americans.

(326) 242. In any case before the Court of Session, in which a European or American is charged jointly with a person of any other race, such other person shall, if he desire it, be tried separately, if the European or American claims to be tried by a jury consisting of at least one-half of Europeans and Americans. (See also Act XIII, 1869.)

Jury when European or American charged jointly with one of another race.

(343) 243. As each *juror* is chosen, his *name shall be called aloud*, and, upon his appearance, *the accused person shall be asked if he objects to be tried by such juror*.

Names of jurors to be called.

Objection may then be made to such juror by the accused person or by the public prosecutor, Government pleader, or other person appointed to conduct the prosecution, and the grounds of objection shall be stated.

Objections to jurors.

Any objection made to a juror shall be decided by the Court, and the decision of the Court shall be final.

If an objection be allowed, the place of such juror shall be supplied by any other juror attending in obedience to a summons, or, if there be no such juror present, then by any other person present in the court whose name is on the list of jurors, or whom the Court considers a proper person to serve on the jury, provided no objection to such juror or other person be made and allowed.

His name shall be called aloud, and accused asked if he objects.—By Criminal Circular No. 4 of 1868 (*vide* W. R.), it was directed that in cases of trials by jury, before commencing proceedings, the Sessions Judge should record in English the names of the jurymen in attendance; and after selection under this section of persons constituting the jury in the case before the Court, the selected names should be marked. On the appearance of each person, accused should be asked if he objected, and if any objection be raised, the name of objector, nature of objection, and decision of the Court should be recorded, and these papers should form part of the record of the case. Under the old law, the objection to a juror was made at the

commencement of the trial, and after the jury had been chosen by lot. An objection by a sailor that the jury was entirely composed of landmen, and therefore could not understand him, was a good one (John Londley, 3 W. R., 14).

(344) 244. Any objection taken to a juror on any of the following grounds, if made out to the satisfaction of the Court, shall be allowed :—

- (1.) Any ground of disqualification within Section 405 ;
- (2.) Standing in the relation of husband, master or servant, landlord or tenant, to the person alleged to be injured or attempted to be injured by the offence charged, or to the person on whose complaint the prosecution was instituted, or to the person accused ;
- (3.) Being in the employment of any of such persons ;
- (4.) Being plaintiff or defendant against any of such persons in any civil suit ;
- (5.) Having complained against, or having been accused by, any of such persons in any criminal prosecution ;
- (6.) Any circumstance which, in the judgment of the Court, is likely to cause prejudice against, or favour to, any of such persons, or which renders such person improper as a juror.

(345) 245. The Judge shall not allow any person to serve on the jury, unless such person understands the language in which the evidence is given or interpreted.

Juror to understand the language in which evidence is given or interpreted.

(346) 246. When the jury has been completed, they shall appoint one of their number to be foreman.

Foreman of jury.

It shall be the duty of the foreman to preside in the debates of the jury, to deliver the verdict of the jury, and to ask any information from the Court that may be required by the jury.

If a majority of the jury do not agree in the appointment of a foreman, he shall be named by the Court.

Section 166, Act I of 1872, lays it down that, "In cases tried by jury, or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put, and which he considers proper." Section 165, *id.*, deals with the point of the Judge's power to put questions.

(364) 247. The witnesses shall then be examined, cross-examined, and re-examined, according to the law for the time being relating to the examination of witnesses.

Examination of witnesses.

Amendment 19 of 1874.—To Section 247, the following words shall be prefixed (namely) :—

“ The person conducting the prosecution shall then open his case, and ”

The procedure in England may be shortly stated as follows :—“ After the witness has been sworn, the counsel for the party who calls him proceeds to examine him. In doing this two things are to be attended to : 1st, that the questions be pertinent to the matter immediately in issue ; and 2nd, that they be not leading questions. When the direct examination is finished the witness may then be cross-examined by the counsel for the opposite party. If any new fact arise out of the cross-examination, the witness may be examined as to it by the counsel who first examined him. In the same manner he may be re-examined when necessary, in order to explain any part of his cross-examination. For the procedure in India, *vide* Act I of 1872, Chapter X, Sections 135 to 163.

Examination of accused before Magistrate to be evidence.

(366) 248. The examination of the accused person before the committing Magistrate *shall be given in evidence* at the trial.

This section refers to the examination of the accused, taken before the Magistrate. The law for the examination of the accused is given in Chapter XXV, Sections 342 to 346, *post*. *Vide* note under Section 193, *ante* ; and with reference to remarks there made to Section 346, *post*, it must be borne in mind that if the provisions of that section have not been complied with, the Court of Sessions must take *evidence* to the effect that the prisoner made the statement recorded.

Shall be given in evidence.—The examination of the accused person before the Magistrate should be put in and read as part of the prosecution before the person accused is called upon to enter on his defence (Criminal Circular No. 11 of 1867, W. R.). It is not a matter of option, but compulsory, that the examination of the accused before the Magistrate be put in evidence before the Session Court. The attestation of the Magistrate is *prima facie* proof that the prisoner's examination is a correct record of his statement, but it is in the power of the accused to prove by evidence that his statement has been incorrectly recorded ; if he cannot produce such proof, the Magistrate's attestation amounts to absolute proof of the genuineness of his examination (Criminal Letters, No. 624, May, 1867, No. 1,114, September, 1867). When a statement made by an accused before the Magistrate bears the Magistrate's attestation, proof of the statement having been made is not necessary, but the proceedings must be presumed to be regular until the contrary is shown (11 W. R., p. 39). *Vide* Section 10, Act I of 1872.

The examination of the accused taken before the Magistrate should be detached from the Magistrate's record and attached to the record of the Session Judge, as only what appears on the Session Judge's record is evidence in such record. It will be as well then for the Magistrate to take the accused's examination on a separate sheet of paper.

This section enacts that the examination of the accused person before the committing Magistrate shall be given in evidence at the Sessions trial. That portion of Section 366 of the old Code which relates to the proof of such examination is omitted, because, by Section 80 of the Indian Evidence Act, the Court is bound to presume that the record of the statement or confession of any prisoner or accused person taken in accordance with law, and purporting to be signed by any Magistrate, is genuine, and that such statement was duly taken.

249. When a witness is produced before the Court of Session, or High Court, the evidence given by him before the committing Magistrate may be referred to by the Court, if it was duly taken in the presence of the accused person, and the Court may, if it think fit, ground its judgment thereon, although the witnesses may at the trial make statements inconsistent therewith.

Evidence given at the preliminary inquiry admissible.

Explanation.—This section shall not authorize the Court to refer to the record of the evidence given by a witness who is absent, except in the cases in which such evidence may be referred to under the Indian Evidence Act (Section 33, Act I of 1872), or other law in force for the time being upon the subject of evidence.

Amendment 20 of 1874.—For the first paragraph of Section 249, the following shall be substituted (namely):—

“ When a witness is produced before the Court of Session or before the High Court in the exercise of its original or appellate criminal jurisdiction, the evidence given by him before the committing Magistrate may, in the discretion of the presiding Judge, be treated as evidence in the case, if it was duly taken in the presence of the accused person.”

This section has been framed to enable the higher Courts to look at the depositions taken by the committing Magistrates. It was already in the Criminal Procedure Code. There was however a doubt in respect to the old Section whether it applied to the High Court both in its original and in its appellate jurisdiction. That it applied to one of them was certain: the doubt was whether it applied to both. This doubt is settled by its being clearly laid down to apply to both.

The deposition given by a witness before a committing Magistrate, when treated as evidence in the case by the Court of Sessions, must be transferred from the record of the committing Magistrate to that of the Sessions Judge.

This section has been added to the Code of Criminal Procedure for the first time by the present enactment, Act X of 1872. It provides that in the case of trials by a Session Judge, the depositions given before the committing Magistrate may be referred to and used by the Court. This does not, however, preclude the necessity of filing on the record of the Session trial, all the evidence admitted at that trial; the charge as framed by the committing Magistrate or by the Sessions Judge (Section 446), the examination of the accused person before the committing Magistrate (249), the examination of a medical witness (323), and the report of the chemical examiner (325), are documents which must be taken out of the record of the preliminary inquiry, and filed on the record of the Sessions trial; similarly all exhibits put forward by either the prosecution or the defence should be initialled by the Session Judge, and filed on his record.

Under English law the deposition or statement on oath of witnesses before Magistrates duly taken according to the provisions either of 11 or 12 Vic., c. 42, s. 17; or, of 30 and 31 Vic., c. 35, s. 6, may be produced at the trial, and given in evidence for or against the accused, if the party who made the same be dead, too ill to travel, insane, or kept away by the prisoner; or, may be given in contradiction of the evidence of deponent, if called as a witness at the trial itself (Steph. Com., vol. iv., c. 22, p. 519).

(373) 250. The Court may from time to time *at any* Examination of the *stage of the trial*, examine (346, *post*) the accused. accused person, and shall question him generally on the case after the witnesses for the prosecution have been examined, and before he is called on for his defence.

At any stage of the trial.—This section contains the provisions of Section 373, Act XXV of 1861, a good deal altered. By this section the Court may at *any* stage of the trial examine the accused. Under the law as it originally stood, the Court could put questions to the accused person, only “at the close of the case for the prosecution, and at the close of the evidence on behalf of the accused” (if he produces any evidence). Where the accused observes silence on being interrogated by a Judge or person in authority, it is termed *judicial* non-responson, and *extra-judicial*, when the criminative interrogation or observation is made by a private person. By the law in England, the only questions allowed to be put to the accused are to desire him to plead guilty or not guilty. Where he refuses to plead, a plea of not guilty will be entered for him. The fact of a man accused of crime either evading the questions put to him or refusing to evidence his innocence, may make one draw the inference from such conduct that he is guilty: at the same time the following additional consideration should not be lost sight of: (1) A perfectly innocent man cannot in *all* cases explain *all* the circumstances which press against him; (2) he may be able only to explain certain circumstances by criminalizing others. It has been held that no presumption of guilt arises from the silence of a prisoner before the Magistrate, when he is charged even by another prisoner with having been found with him in the commission of an offence (*Reg. v. Appleby*, 3 Stark., 33). It is often good policy on the part of the accused not to disclose his defence until judicially demanded of him on his trial before the Sessions Court. *False responson* is a criminative fact infinitely stronger than non-responson or evasive responson; but even such conduct has its infirmative circumstances, for innocent persons have been found, under the influence of fear, &c., to resort to *false evidence* in their defence: false statements may arise from similar causes (*Best L. and F.*, 316—320). *Vide* notes under Section 193, *ante*, as to self-criminating answers.

For the marked distinction between the examination of the accused under this section, and the defence of an accused under Section 346, *post*, see note on the subject under the latter section.

(372, 374) 251. When the examination of the witnesses Defence. for the prosecution and the examination of the accused person is concluded, the accused person shall be asked whether he means to call witnesses. If he says that he does not, the prosecutor may sum up his case. The Court may then, if it thinks that there are no grounds for proceeding,

In a case tried with assessors, record a finding, or, in a case tried by a jury, instruct the jury to return a verdict of acquittal.

If the Court consider that there are grounds for proceeding, it shall call on the accused person to state his grounds of defence and produce his witnesses.

The accused person or his counsel, or authorized agent, *may then state the case for the defence*, and may examine the witnesses, if any, produced for the defence, and at the conclusion of such examination may sum up his case.

This section has been inserted in the C. C. P. by the present enactment, Act X of 1872, on the provisions of this section.

May then state the case for the defence.—If any defence is set up, the nature of such defence should be recorded. If no defence is made, this fact should be recorded. If questioned as to his defence, and he declines to reply, this fact should be noted. He may, if he chooses, put in a written defence. But, from the circular ruling of the late Agra S. N. A., whatever takes place at this juncture of the case, should be recorded by the Judge.

(376) 252. If any evidence is adduced on behalf of the accused person, the officer conducting the prosecution shall be entitled to reply.

(348) 253. Whenever, in the opinion of the Court, it is proper and convenient that the jury or assessors should view the place in which the offence charged is said to have been committed, or any other place in which any other transaction material to the inquiry in the trial took place, an order shall be made to that effect, and the jury or assessors shall be conducted in a body, under the care of an officer of the Court, to such place, which shall be shown to them by a person appointed by the Court.

Such officer shall not *suffer any other person to speak to, or hold any communication* with, any of the jury or assessors, and they shall, when the view is finished, be immediately conducted back into court.

Suffer any other person to speak to.—This appears a childish enactment.

Or hold any communication.—In cases of view by assessors of the scene of the alleged offence, it was held that the Judge could not delegate his own function of examining witnesses on the spot, to the assessors, who cannot, under this section, speak to or communicate with any other

person than the officer appointed to conduct them to the place (5 W. R., p. 59, *Queen v. Chutrerdharee Singh*).

(350) 254. If, in the course of a trial by jury at any time prior to the finding, any juror, *from any* Procedure when juror becomes unable to attend. *sufficient cause*, is prevented from attending through the trial,

Or if any juror absents himself, and it is not possible to enforce his attendance,

A new juror shall be added, or the jury shall be discharged and a new jury empanelled, and in either case the trial shall commence anew.

From any sufficient cause.—If from insufficient cause, he can be dealt with under Section 414, *post*.

(324, 379) 255. When the case for the defence and the Assessor's opinion prosecutor's reply, if any, are concluded, and charge to jury. the Court shall proceed—

In cases tried with assessors, to ask the assessors their opinion, and shall record it :

In cases tried by jury, to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided.

A statement of the Judge's direction to the jury shall form part of the record.

This section has been added to the Code of Criminal Procedure by the present Enactment, Act X of 1872 (see notes to Sections 276 and 299, *post*).

256. It is the duty of the Judge to decide all questions of law, and especially all questions as to the relevancy of facts which it is proposed to prove, the admissibility of evidence, or the propriety of questions asked by parties or their agents which may arise in the course of the trial ; and in his discretion to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties ;

To decide upon the meaning and construction of all documents given in evidence at the trial ;

To decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given

To decide whether any question which arises is for himself or for the jury, and upon this point his decision shall be final.

The Judge may, if he thinks proper in the course of his summing up, express to the jury his opinion upon any question of fact, or upon any question of mixed law and fact relevant to the proceeding.

Illustrations.

(a.) It is proposed to prove a statement made by a person not called as a witness under circumstances which render evidence of his statement admissible.

It is for the Judge, and not for the jury, to decide whether the existence of those circumstances has been proved.

(b.) It is proposed to give secondary evidence of a document, the original of which has been lost or destroyed.

It is the duty of the Judge to decide whether the original has been lost or destroyed.

This section has been added to the Code of Criminal Procedure by the present enactment, Act X of 1872.

"Ad quæstionem facti, non respondent Judices, ad quæstionem legis, non respondent juratores."—It is the office of the Judge to instruct the jury in points of law; of the jury to decide on matters of fact (Legal Maxims, p. 99).

This extract from Broom's Legal Maxims is given here, because the pith of it is contained in every ruling of the High Courts with regard to the duties of the Judge and jury severally; and having at present no model of our own, it is best to keep close to that of the English law.

The object in view on the trial of a cause is to find out, by due examination, the truth in the point at issue between the parties, in order that judgment thereupon may be given, and therefore the facts of the case must in the first instance be ascertained (usually through the intervention of a jury), for *ex facto jus oritur*. If the fact be perverted or misrepresented, the law which arises thence will unavoidably be unjust or partial.

E.g., Malicious Indictment.—An action for indicting maliciously and without probable cause, is a mixed proposition of law and fact; whether the circumstances alleged to show it probable or not probable are true and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law. It therefore falls within the legitimate province of the jury to investigate the truth of the facts offered in evidence, and the justness of the inferences to be drawn from such facts; whilst at the same time they receive the law from the Judge, viz., that, according as they find the facts proved or not proved, and the inferences warranted or not, there was reasonable and probable ground for the prosecution or the reverse; and this rule holds, however complicated and numerous the facts may be. *E.g., Libel.*—In cases of libel, it has been the course for a long time for the Judge first to give a legal definition of the offence, and then to leave it to the jury to say whether

the facts necessary to constitute that offence are proved to their satisfaction; and this course is adopted whether the libel is the subject of a criminal prosecution or of a civil action; and although the Judge *may*, as a matter of advice to them in deciding that question, give his own opinion as to the nature of the publication, yet he is not bound to do so as a matter of law. But, although the general principle is as above laid down, there are many exceptions to it. Thus all questions of reasonableness, reasonable cause, reasonable time, and the like, are, strictly speaking, matters of fact, even where it falls within the province of the Judge or the Court to decide them. Where the Judge misconceives his duty, and presents the question at issue to the jury in too limited and restrained a manner, and where, 'consequently, that which ought to have been put to them for the exercise of their judgment upon it as a matter of fact or of inference, is rather left to them as a matter of law, to which they feel bound to defer, the Court *in banco* will in its discretion remedy the possible effect of such misdirection by granting a new trial. So, likewise, in a penal action, the Court will grant a new trial when they are satisfied that the verdict is in contravention of law, whether the error has arisen from the misdirection of the Judge, or from a misapprehension of the law by the jury, or from a desire on their part to take the exposition of the law into their own hands (Ex. B. L. M., 4th edition, pp. 105-113).

On this maxim, *ad quæstionem facti, non respondent Judices, ad quæstionem legis, non respondent juratores*, the *Madras Jurist* of the 1st July, 1871, has the following very pertinent remarks:—The above maxim is founded on the principle that whether there is any evidence is a question for the Judge, but whether the evidence is sufficient is a question for the jury. So where a question arises as to the admissibility of evidence, the facts upon which its admissibility depends are to be determined by the Judge, and not by the jury The Judge states the substance of the charge, divesting it of all technical phraseology which may encumber, directs the attention of the jury to the precise issue they have to try, and applies the evidence to that issue. Errors of omission in summing up may be quite as important as errors of commission. (*Vide R. v. Sheikh Mya Valad Dand.*)

The Judge ought not to introduce into his direction to the jury any question as to recommending a prisoner to mercy, but should leave that entirely to the jury.

In summing up, the evidence for the prosecution should be analysed and explained to the jury—any weakness in the evidence should be pointed out. An omission to so aid the jury in the arrangement of facts spoken to by witnesses, and in directing them on points of law, was held to be an error requiring the conviction to be quashed.

As remarked in a previous note, it is for the jury and not the Judge to resolve and find what the fact is; therefore, always in discreet and lawful assistance of the jury, the Judge's direction is hypothetical and upon supposition, and not positive and upon coercion, viz., if you find the fact thus (leaving it to them what to find), then you are to find for the plaintiff; but if you find the fact thus, then it is for the defendant (B. C. L., 132).

With reference to the importance of a Judge pointing out the difference between murder and culpable homicide, see notes to Sections 299 and 300 Penal Code.

The fact of a child's competency to give evidence is in the province of the Judge ; what weight is to be attached to the child's evidence is in the province of the jury (8 W. R., 60).

Duty of Jury. 257. It is the duty of the jury—

- (1.) To decide which view of the facts is true, and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned ;
- (2.) To determine the meaning of all technical terms and words used in an unusual sense which it may be necessary to determine, whether such words occur in documents or not ;
- (3.) To decide all questions declared by the Indian Penal Code, or any other law, to be questions of fact ;
- (4.) To decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure, or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning.

Illustrations.

(a.) A is tried for the murder of B.

It is the duty of the Judge to explain to the jury the distinction between murder and culpable homicide, and to tell them under what views of the facts A ought to be convicted of murder, or of culpable homicide, or to be acquitted.

It is the duty of the jury to decide which view of the facts is true, and to return a verdict in accordance with the direction of the Judge, whether that direction is right or wrong, and whether they do or do not agree with it.

(b.) The question is whether a person entertained a reasonable belief on a particular point. Whether work was done with reasonable skill, or due diligence.

Each of these is a question for the jury.

The office of the jury "is no other than to inquire of matters of fact, and not to adjudge what the law is, for that is the office of the Court and not of the jury ; and if they find the matter of fact at large, and further say that thereupon the law is so, where in truth the law is not so, the Judges shall adjudge according to the matter of fact, and not according to the conclusion of the jury" (B. C. L., 159).

The question as to the knowledge possessed by a person of a given fact, is for the decision and judgment of the jury. The probability of actual knowledge upon consideration of time, place, the opportunities of

testimony, and other circumstances, may in some instances be so strong and cogent as to cast the proof of ignorance on the other side in the opinion of the jury, and in the absence of such proof of ignorance lead them to infer knowledge; but such inference properly belongs to them (Broom, pp. 257, 258).

"In cases tried by jury, or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put, and which he considers proper" (Sec. 166, Act I of 1872). A juror is a judge bound by oath to say whether or not certain evidence satisfies his mind; the province of juries is not speculative, but active.

258. If a juryman or assessor is personally acquainted with any relevant fact (*vide* Act I of 1872, Chap. II, Sections 5 to 16), it is his duty to inform the Judge that such is the case, whereupon he may be examined, cross-examined, and re-examined in the same manner as any other witness.

When juryman or assessor may be examined.

The provisions of this section take us back to the principles on which juries were formed in the time of the Anglo-Saxons, so that some of the merits of that original mode of judicial investigation have cropped up in their integrity on Indian soil. The jurymen of those days we know were witnesses themselves, so also under this section a juryman or assessor can be a witness as well as a trier of the issue—and why not? A Judge himself can come down off his bench and swear himself, and give evidence to himself, and go back on to the bench and decide the case (*vide* R. v. Mukta Singh, p. 164, *ante*).

(353) 259. If, in the course of a trial with the aid of assessors, at any time prior to the finding, any assessor is, from any sufficient cause, prevented from attending through the trial, the trial shall proceed with the aid of the other assessor or assessors.

Procedure when assessor is unable to attend.

If all the assessors are prevented from attending through the trial, the proceedings shall be stayed, and a new trial shall be held with the aid of fresh assessors.

(378) 260. If a trial is adjourned, the jury or assessors shall be required to attend at the adjourned sitting, and at every subsequent sitting, until the conclusion of the trial.

Jury or assessors to attend at adjourned sitting.

(380) 261. In cases tried with assessors, the Court shall proceed to pass judgment of acquittal or conviction, having considered the opinions of the assessors, but not being bound to conform to them.

Cases tried with assessors.

If the accused person is convicted, the Court shall proceed to pass sentence on him according to law.

This section has been added to the Code of Criminal Procedure by the present enactment, Act X of 1872, and comprises the rulings of the High Courts on this subject.

(324) 262. The opinion of each assessor shall be given orally, *and shall be recorded in writing* by the Court, but the decision is vested exclusively in the Judge.

And shall be recorded in writing.—"The opinion of each assessor shall be given orally, and shall be recorded in writing by the Court." This record should appear at the commencement of the judgment of the Sessions Judge. It is not sufficient that this record shall contain a mere verdict of guilty or not guilty, or proven or not proven; the Court requires the reasons by which each assessor arrives at that result,—that is, the grounds of his opinion. While avoiding prolixity, a Sessions Judge should be careful to be intelligible and precise in recording such opinions. In recording in writing the opinion of each assessor as required by this section, the Sessions Judge should not merely put in his judgment that he concurs with, or differs from, the assessors, but should separately record an opinion of each assessor, and should invite and encourage each assessor to make that opinion more than a bare expression for or against the prisoner, but an opinion on the case, stating the view that the assessors take of the facts, and the consideration (in brief) on which his opinion is founded (J. C. O. Cir. 60 of 1865, and 4 R. J. P. J., 422).

(352) 263. In cases tried by jury, the jury may retire to consider their verdict. It shall be the duty of an officer of the Court not to suffer any person to speak to or hold any communication with any member of such jury. When the jury have considered their verdict, the foreman shall inform the Court what is their verdict, or what is the verdict of a majority.

The jury shall return a verdict on all the charges on which the accused is tried, and the Court may ask them such questions as are necessary to ascertain what their verdict is. Such questions and the answers to them shall be recorded.

If the jury are not unanimous, the Judge may require them to retire for further consideration. After such a period as the Judge considers reasonable, the jury may deliver their verdict, although they are not unanimous.

If the Court does not think it necessary to dissent from the verdict of a majority of the jurors, it shall give judgment accordingly. If the accused person is acquitted, the Court shall record judgment of acquittal. If the accused person is convicted, the Court shall proceed to pass sentence on him according to law.

If the Court disagrees with the verdict of the jurors or of a majority of such jurors, and considers it necessary for the ends of justice to do so, it may submit the case to the High Court, and may either remand the prisoner to custody or admit him to bail.

The High Court shall deal with the case so submitted as with an appeal, but it may convict the accused person on the facts, and if it does so, shall pass such sentence as might have been passed by the Court of Session.

Amendment 21 of 1874.—In the fourth paragraph of Section 263, after the word “verdict,” the words “of the jurors or” shall be inserted; and for the fifth and sixth paragraphs of the same section the following shall be substituted (namely):—

“If the Court disagrees with the verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which the prisoner has been tried, and considers it necessary for the ends of justice to do so, it may submit the case to the High Court. If the Court does so, it shall not record judgment of acquittal or of conviction on any of the charges on which the prisoner has been tried; but it may either remand him to custody or admit him to bail.

“The High Court shall deal with the case so submitted as it would deal with an appeal, but it may acquit or convict the accused person on the facts as well as law, without reference to the particular charges as to which the Court of Session may have disagreed with the verdict; and if it convict him, shall pass such sentence as might have been passed by the Court of Session.”

Shall deal with a case so submitted as with an appeal.—These words are to be construed simply as directing the procedure to be followed, such as regards the notices to be served, and so on. The Court may send for additional evidence, and deal with the case generally as is provided in Chapter XX with regard to appeals. The prisoner is therefore in a better position with regard to an appeal, if that appeal be made through the intervention of a Judge, than if he had preferred it himself, because Section 271, *post*, immediately says that, if the conviction was in a trial by jury,

the appeal by the person convicted shall be admissible on a matter of *law* only. Here the words are general words, without any limitation at all, and extend to a disagreement with the verdict on *matters of fact* as well as on matters of law. A case submitted under this section in the case of a conviction is intended by the Legislature to be submitted for a wider purpose than simply that of becoming an appeal by the prisoner (11 W. R., 17, 19).

But.—This word “*but*” is used, not so much in opposition to the word “appeal” in the first part of the passage, as in opposition to, or enlargement of, the enactment of Section 272, *post*. So construed, it simply means, that upon a case submitted by the Judge, the Court may, in the event of an acquittal, convict the accused person on the facts, notwithstanding the general prohibition to be found in the words of Section 272, “the Local Government, &c. (down to) Criminal Court” (11 W. R., 18).

This section has been added to the Code of Criminal Procedure by the present enactment, Act X of 1872.

All criminal prosecutions in France are conducted by a public prosecutor, appointed by Government. The jury consists of twelve persons. Originally the verdict could be returned by a simple majority; but under the law of 28th April, 1832, no decision can be given against the accused except by a majority of more than seven votes; a similar majority of more than seven votes may find the existence of extenuating circumstances so as to reduce the punishment. One of the greatest defects in the English system of Criminal Procedure is the want of a public prosecutor, such as exists in France and Scotland, and with reference to this procedure Lord Brougham says: “Anything so bad, we may safely affirm, exists in no other country under the sun.” The jury which tries the prisoner in England consists of twelve men, and their verdict must be unanimous,—this requirement of unanimity being truly termed by Hallam in his *Middle Ages* as “that preposterous relic of barbarism.” Why not adopt the rule followed in France by requiring in a jury of twelve a majority of more than seven votes, which would secure the concurrence, at least, of two-thirds of the whole jury. In Scotland the jury consists of fifteen in criminal trials; there seems no good reason why the number should not be reduced to twelve, and the jury may decide against the accused by a simple majority of eight to seven, so that the scale is turned against him by *one* vote; so by the provisions of this Section 263, the accused can be convicted by a simple majority. But Section 236, *ante*, lays it down that the jury shall consist of not less than three or more than nine. One great peculiarity of the Scotch criminal system is that the Lord Advocate in his character of public prosecutor, may pass from any charge at pleasure, and restrict the penalty to an arbitrary punishment short of death before moving for sentence.

Much of the office of jurors in order to their verdict is ministerial, as not withdrawing from their fellows after they are sworn; not withdrawing after challenge; not receiving from either side evidence after their oath not given in Court, &c., &c., wherein if they transgress they are finable; but the *verdict itself*, when given, is an act ministerial, not judicial, and according to the best of their judgment, for which they are not finable nor to be punished, but by attain: so is the law in England (*vide* Bushell’s case, B. C. L. p. 141).

(377) 264. The Court may, in its discretion, postpone the hearing of the case, and may from time to time adjourn the trial, if it considers that such adjournment is proper and will promote the ends of justice.

Adjournment.

Postponement of trial.

(347) 265. The same jury may try, or the same assessors may aid in the trial of, as many accused persons successively as to the Court seems fit.

The same jury or assessors may try in succession several offenders.

PART VI.

APPEAL, REFERENCE, AND REVISION.

CHAPTER XX.

APPEALS.

This chapter contains the provisions of Chapter XXX, Act XXV of 1861, and Section 445C, Chapter XXXI, Act XXV of 1861, as amended by Act VIII of 1869. Certain alterations have been made in this chapter, *e.g.*, Section 272, the permission of an appeal against an acquittal; also Section 280, giving the Appellate Court power to enhance sentences. Before the original C. C. P. was amended by Act VIII of 1869, sentences could be enhanced by the Appellate Court under the provisions of Section 422. C. P. (See notes under Section 282, *post.*)

The Punjab Chief Court have held that there was no law that prevented a Judge, sitting as an Appellate Judge, from hearing an appeal from an order passed by him when presiding over an inferior Court (8 P. R., Cr. J., 22). It may not be illegal, but it is highly inexpedient.

In going through the following sections on appeals it will be as well to bear in mind, that an appeal to the High Court should be made within sixty days from the date of the sentence appealed against. An appeal *may* be admitted after this term of limitation, if the Court is satisfied that there is sufficient cause for the appeal not having been presented within the prescribed period. (See Act IX of 1871, Schedule II, Art. 152, and Section, 5, *ib.*, clause *b.*) An exception to this will be found in Section 271, *post*, in the case of a sentence of death.

(412) 266. Any person convicted on a trial held by any Magistrate of the second or third class, or any person sentenced by a competent Magistrate of the second class under Section 46, may appeal to the Magistrate of the District, or to a Magistrate of the first class who has been empowered by the Local Government to hear such appeals.

Appeals from officers exercising powers less than those of a Magistrate of the first class.

(409) 267. Any person required by a Magistrate of the first class to give security for good behaviour under Section 504, or Section 505, may appeal to the Magistrate of the District.

Appeals in bad livelihood cases.

The provisions of this section are the same as the provisions contained in the latter part of the old Section 409. Except that by the law as it stood in the latter section, appeal lay to the Court of Session, whereas now, with a view of emphasizing the responsibility of the Magistrate of the District, for the peace and order of the District, it is provided that appeals from orders by Magistrates to furnish security for good behaviour, shall in every instance lie to this officer.

A man who, in default of finding security for good behaviour, has been sent to prison, cannot, on the expiration of such term, be re-committed to jail under Sections 504 or 505. The law contemplates that he should be set at liberty, and allowed the opportunity of leading a new life. (*In re* Juswant Singh.)

(413) 268. Any person convicted by any Civil, Criminal, or Revenue Court under Chapter XXXII of this Act, may appeal to the Court to which decrees or orders made in such Court are ordinarily appealable, whatever may be the amount of the sentence passed, subject to the rules provided in Sections 275, 277, 278, 280, 281, and 282.

An appeal from such conviction by a Small Cause Court may be made to the Court of Session within whose Sessions Division such Court is situate.

(409) 269. Any person *convicted* on a trial held by the Magistrate of the District, or other Magistrate of the first class, or any person sentenced under Section 46 by a competent Magistrate of the first class, *may appeal* to the Court of Session.

The appellant shall in every case give notice of appeal to the Magistrate of the District, who shall, if necessary, instruct the Public Prosecutor, Government Pleader, or other officer empowered by Government or by the Magistrate of the District to prosecute the case.

This section gives an appeal to any person *convicted* on a trial held by a Magistrate. Where the identity of an accused person with A, convicted of rioting three years previous, the Calcutta High Court held that the result of the Magistrate's inquiry into A's identity was not a "*conviction*." A person can only be *convicted* of some thing that is an offence; and as the identity question had no direct connection with the *factum* of the riot, it cannot be said that the Magistrate's decision on that point was a *conviction* (C. L., 201; 18 W. R., 2).

May appeal.—If such appeal is from the sentence of a Magistrate of any class, the Appellate Court shall not inflict a greater punishment than might have been inflicted by a first-class Magistrate (proviso to Section 280, *post*).

(445 c) 270. Any person convicted on a trial held by any officer invested with the power described in Section 36, may appeal to the High Court, if it appear from the sentence awarded that such officer was in such trial exercising such special powers. No appeal in such case shall lie to the Court of Session.

Any person convicted by an Assistant Sessions Judge may appeal to the Sessions Judge if the sentence appealed against does not exceed three years' imprisonment.

A sentence of an Assistant Sessions Judge confirmed, under Section 18, by the Sessions Judge may be appealed to the High Court.

This section provides that appeals by persons convicted by officers invested with special powers under Section 36, shall lie to the High Court, if it appear from the sentence awarded that such officer was exercising such special powers. It is to be borne in mind that in every case in which a sentence exceeding three years' imprisonment is awarded by an officer exercising powers under Section 36, such sentence must be confirmed by the Court of Sessions. It is clear, then, that an appeal to the Court of Sessions under such circumstances would be useless.

Appeals by persons convicted by Sessions Court. (408) 271. Any person convicted on a trial held by a Sessions Judge may appeal to the High Court.

The appeal may be on a matter of fact as well as on a matter of law.

If the conviction was in a trial by jury, the appeal shall be admissible *on a matter of law only*.

If such person be sentenced to death, the Sessions Court shall inquire whether he wishes to appeal, and if he signifies his intention to appeal, the Court shall inform him that his appeal must be made *within seven days*, and shall delay the transmission of the reference, hereinafter required, for a reasonable time, not exceeding seven days, to allow of the appeal and reference being made at the same time.

When it appears that the execution of the sentence should not be delayed, the Sessions Court may record its reasons and forward the reference at once.

In no case requiring confirmation shall the High Court grant a longer delay than is herein allowed for the presentation of an appeal.

Where the reasons given by the Sessions Court for forwarding the reference at once are sufficient, the High Court shall decide the case in the absence of an appeal.

When, under the provisions of the law in force, judgments or orders made or passed by the High Court are made or passed, either in appeal, reference, or revision, by a Court consisting of more than one Judge, any difference of opinion shall be settled by adding, when the High Court is composed of more than two Judges, and the Court is equally divided, one or more Judges, and in such event the judgment or order shall follow the opinion of the majority of the Judges.

Amendment 22 of 1874.—For Section 271, the following sections shall be substituted (namely):—

“271. Any person convicted on a trial held by a Ses-

Appeal from sentence of Sessions Judge. sions Judge may appeal to the High Court.

"An appeal may lie on a matter of fact as well as a matter of law, except where the conviction was in a trial by jury, in which case the appeal shall be admissible on a matter of law only."

"271A. When any such person is sentenced to death, the Sessions Court shall give him a copy of the sentence and inform him that, if he wishes to appeal, his appeal must be made within seven days; and the Court shall delay the transmission of the reference hereinafter required for a reasonable time not exceeding seven days to allow of the appeal and reference being made at the same time.

"When it appears that the execution of the sentence should not be delayed, the Sessions Court may forward the reference at once, recording its reasons for so doing."

"271B. Where the Judges composing the Court of appeal, reference, or revision are equally divided, the case, with their opinions thereon, shall be laid before another Judge, and such Judge, after such examination and hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion."

The sole object of this provision is that in such cases the two dissenting Judges shall be bound by the opinion of a third Judge.

On matter of law only.—As an appeal against the verdict of a jury is restricted to points of law, the petition should state specifically in what respect the law has been contravened (1 W. R., 21). Improper admission of evidence is not in itself a ground of appeal if it appear that, independently of the evidence objected to and admitted, there is sufficient evidence to justify the decision (6 W. R., 41).

The Penal Code has no application to offences committed before it came into operation, and in such cases, though tried by a jury, an appeal will lie as to facts as well as law (3 W. R., 58).

Within seven days.—Vide note at the commencement of these sections on appeals, as to the time within which appeals must be made. Paragraph 4 of this section is an exception to the rule there quoted.

(407) 272. The Local Government may direct an appeal by the Public Prosecutor, or other officer specially or generally appointed in this behalf, from an original or appellate judgment of acquittal, but in no other case shall there be an appeal from a judgment of acquittal passed in any Criminal Court.

Such appeal shall lie to the High Court, and the rules of

limitation shall not apply to appeals presented under this section.

The High Court may, in any case so appealed, direct a new trial by another Court, or may pass such judgment, sentence, or order as may be warranted by law.

Amendment 23 of 1874.—In the second paragraph of Section 272, for the words “and the rules of limitation shall not apply to appeals presented under this section,” the following clause shall be substituted (namely):—

“No appeal shall be presented under this section after six months from the date of the judgment complained of.”

Under the old law, as contained in Section 407, Act XXV of 1861, there was no appeal from a judgment of acquittal passed in any Criminal Court. The present Section, 272, allows an appeal under certain circumstances, in case of acquittal. This power, it must be borne in mind, is not given to a private prosecutor, but is limited to Local Governments. Had this power been extended to private prosecutors, it would undoubtedly have put a dangerous weapon for private revenge into hands well versed in turning it to the worst account.

(411) 273. There shall be no appeal in cases in which a District, or other Magistrate of the first class, passes a sentence of imprisonment not exceeding one month only, or of fine not exceeding fifty rupees only, or of whipping only.

There shall be no appeal from a sentence of imprisonment passed by such Court or officer in default of payment of fine when no substantive sentence of imprisonment has been passed.

Where an accused person has been convicted on his own plea, whether on a trial with assessors or by jury, there is no appeal, except as to the extent or legality of the sentence.

Or of fine only.—This section merely denies an appeal where there is a sentence of not more than one month's imprisonment, or a sentence to a fine not exceeding 50 rupees. Where there is a sentence of fine and imprisonment, an appeal unquestionably lies.

In the case of Kala Bhai Megha Bhai, 7 Bo., H. C. R., 35, it was held, that jurisdiction over the appeal of one person does not give the Sessions Judge constructive jurisdiction over the convictions of other accused, whose sentences are not appealable.

A was convicted of offences under Sections 143, 447, and 211, P. C., and sentenced by the Magistrate to one month's imprisonment for each offence. *Held* that, under this Section 273, there was no appeal. The separate sentences could not be taken together and combined in one sentence, so as to give a right of appeal (1 B. L. R., 3).

274. There shall be no appeal in cases tried summarily in which a Magistrate of the District, or a Magistrate or Bench of Magistrates invested with the powers of a Magistrate of the first class, empowered to act under Section 222, 223,

Appeals from summary convictions.

or 224, passes a sentence of imprisonment not exceeding three months only, or of fine not exceeding two hundred rupees only, or of whipping only.

An appeal may be brought against any sentence referred to in Section 273 or 274, by which any two or more of the punishments therein mentioned are combined, but not against a sentence in which imprisonment is awarded in default of payment of fine, and in addition thereto.

Nor against any sentence which would not otherwise be liable to appeal, because the person convicted is ordered to find security to keep the peace.

The provisions of this and the last preceding section shall not apply to appeals from orders passed on European British subjects, under Section 74 or 76.

Saving of sentences on European British subjects.

Amendment 24 of 1874.—In the second clause of Section 274, the last twenty words shall be omitted, and to the section the following explanation shall be added (namely) :—

“EXPLANATION.—A sentence by which imprisonment is awarded in default of payment of fine, is not a sentence by which two or more punishments are combined, within the meaning of the second clause of this section.”

(416) 275. Every *petition* of appeal shall be accompanied by a copy of the judgment or order appealed against.

Copy of sentence to accompany petition.

Petition.—As an appeal against the verdict of a jury is restricted to points of law, the petition in this instance should state specifically in what respect the law has been contravened (1 W. R., 21). A petition by a prisoner or person under duress of Court is exempt from stamp duty (Act VII, 1870, Section 19, Clause XVII).

(440) 276. A copy of *the judgment* or other order passed by any Criminal Court, and, in cases tried by jury, of *the Judge's charge* to the jury, shall be furnished without delay on the application of any *person affected* by such sentence or order.

Copy of sentence or order to be furnished.

Such copy shall be made at the expense of the person applying for it, unless he is in jail, or unless the Court, for some special reason, sees fit to grant such copy free of expense.

Amendment 25 of 1874.—For Section 276, the following shall be substituted (namely) :—

“276. If any person affected by a sentence or other

Copies of proceed- order passed by a Criminal Court desires
ings. to have a copy of the Judge's charge to
the jury or of any other proceeding not being the judgment
or order provided for by Section 464, he shall, on applying
for such copy, be furnished therewith, provided that he pay
for the same, unless the Court, for some special reason,
sees fit to furnish it free of cost."

This section as now amended applies only to the grant of copies of proceedings not
being the judgment or order, consequently copies of judgments or orders must be granted
under Section 464, C. C. P.

Shall be furnished without delay.—By English law in either case, whether of bailing or
commitment, the accused is entitled to demand from the person having the custody of
the same, copies of the examinations (or depositions) on which he shall have been bailed
or committed, upon payment for them at a prescribed reasonable rate (11 and 12 Vic.,
c. 42, s. 27; 30 and 31 Vic., c. 35, s. 4; see, also, *Queen v. Lord Mayor of London*,
5 Q. B., 555; *R. v. Davies*, 1 L. M., and p. 323).

The present section has substituted the words of *the judgment*, for the words of *the*
final sentence, as the old law had it; but this alteration is merely verbal, as the Court
had, under the provisions of Act VIII of 1869, to give its reasons for passing or making
the final sentence. The term *any person affected* is substituted for any party to the
case. The making it compulsory for the Judge to furnish to the applicant his charge to
the jury (which is now a part of the record of the case by the provisions of Section 255,
ante), is a provision now added to the Code for the first time, and will, doubtless, be
efficacious in making Judges take extra pains to acquaint themselves more fully with one
of the most difficult branches of their duties; and further, it will enable the High
Courts to see how the facts have been presented to the jury by the Judge; and is a most
important safeguard for the accused that he be not convicted by the jury through any
misdirection of the Judge; for by the provisions of Section 299, *post*, the High Court
can reverse or set aside the verdict of a jury and order a new trial, if of opinion that
the jury was misdirected by the Judge. As to what is the duty of the Judge and what
the duty of the jury, see Sections 256 and 257, *ante*, and notes thereto.

(418) 277. If the party appealing be in jail, he shall be
at liberty to present his petition of appeal
and the copy of the *judgment* or order
appealed against to the Magistrate or
other officer in charge of the jail, who shall thereupon for-
ward the petition to the proper appellate authority.

Procedure where ap-
pellant in jail.

(417) 278. The Appellate Court *shall fix a reasonable*
time within which the appellant or his
counsel or *authorized* agent may appear,
and it may reject the appeal if, on a perusal of the peti-
tion of appeal and the copy of *the judgment* or order ap-
pealed against, and after hearing the appellant, or his
counsel or authorized agent, if he appears, it considers that
there is no sufficient ground for questioning the correctness
of the decision or for interfering with the sentence or order
appealed against.

Before rejecting the appeal, the Court may call for and

peruse *all* or any part of the proceedings of the Lower Court, but shall not be bound to do so.

Amendment 26 of 1874.—To Section 278, the following clause shall be added (namely) :—

“ In rejecting an appeal under this section, the Appellate Court shall not enhance the sentence.”

Under the provisions of this section, as it now stands, the Court shall fix a reasonable time within which the appellant, &c., may appear. As in the preceding section so in this, the word *judgment* has been substituted for sentence, and the word *authorized* inserted before agent, and the Court is given the power of calling for *all* as well as any part of the proceedings. I presume it could do so before, but the word *all* was not in the old law.

279. If the Appellate Court decide to hear the appeal, it shall cause notice to be given to the appellant, and, if the appeal be to the Session or High Court, shall also give notice to the Magistrate of the District, who shall inform, if necessary, the Public Prosecutor, Government pleader, or other officer empowered by Government on that behalf, of the day on which such appeal will be heard.

Notice of appeal.

Amendment 27 of 1874.—To Section 279, the following words shall be added (namely) :—

“ and in cases under Section 272, where the Appellate Court decides to hear the appeal, it shall also cause notice to be given to the respondent.”

This section introduces a new procedure in the disposal of appeals, and provides for notice of appeal being given in certain cases to the prosecution.

(419) 280. *The Appellate Court*, after perusing the proceedings of the Lower Court, and after hearing the appellant, his counsel or agent, if they appear, and the *Public Prosecutor, Government pleader, or other officer empowered by Government or by the Magistrate of the District in that behalf*, if he appears, may alter or reverse the finding and sentence or order of such Court, and may, if it see reason to do so, *enhance* any punishment that has been awarded :

Appellate Court may alter or reverse finding and sentence, or enhance a sentence.

Provided that if the appeal is from the sentence of a Magistrate of any class, the Appellate Court shall not in-

flit a greater punishment than might have been inflicted by a first-class Magistrate.

Amendment 28 of 1874.—To the first clause of Section 280, the following words shall be added (namely):—

“or order the appellant to be retried.”

From the wording of the present Code of Criminal Procedure, it is not clear whether the term “Appellate Court” here used refers exclusively to the High Court, or whether any Court of Appeal may order the re-trial of an accused. The provisions of Section 284, *post*, tend to make one think that the term “The Appellate Court,” here made use of, refers to any Appellate Court, and not to the High Court alone.

The High Court is empowered, both as a Court of Appeal and also as a Court of Revision, to inquire into the sufficiency of sentences passed by inferior Courts, and if it so see fit, to *enhance* the punishment. The Legislature has thus imposed upon the High Court the duty of seeing that the inferior Criminal Courts do not, by the infliction of lenient punishments, give, as it were, encouragement to the commission of serious offences.

Public Prosecutor, &c.—A private prosecutor cannot move a Court of Sessions under this section in a case which is not before that Court *in appeal*; a private prosecutor has no right to be heard before the High Court in a case in which he could not be heard in a Sessions Court (14 W. R., 51).

Enhance.—This power of enhancing punishment if considered insufficient has been reintroduced by the present Act. This is nothing new; it is merely a return to the practice of Act XXV of 1861. Mr. Campbell, in his remarks on the C. C. P. Bill, spoke on the subject as follows:—“It appeared to his Honour that, where we afforded the greatest facilities for an appeal to the superior tribunals, the superior tribunal to whom the criminal appealed should have the power to decide what was the proper punishment for the offence; and if that tribunal considered that the punishment that had been awarded was inadequate, it should be in its power to award an enhanced punishment. More than that, it appeared to him that there was a practical necessity for such a provision. Our law as to criminal appeals was the most liberal law in the world: there was no law that was so liberal as to allow a person to say to his jailor, ‘I wish to appeal,’ and the jailor was bound to send the appeal on to the Judge without expense or trouble to the appellant. The result of such a law was that the prisoner could lose nothing by his appeal, and might possibly gain something; and the consequence of such a state of things was that, in some districts, there was no such thing as a case that had not been appealed. His Honour said that was carrying matters to an undesirable extreme, and he thought it was only fair that, if a man chose to appeal, he should run the risk of his sentence being enhanced by the Appellate Court if it was inadequate.”

(421) 281. In any case, in which an appeal is allowed, the Appellate Court may, pending the appeal, order that the sentence be suspended, and if the appellant be in confinement for an offence which is bailable, may order that he be released *on bail*.

The period during which the sentence is suspended shall be omitted in reckoning the completion of the punishment.

On bail.—Under the provisions of Section 399, *post*, the Court may permit the accused to deposit a sum of money or Government promissory notes in lieu of bail; the only exception being in cases coming under Chapter XXXVIII, relating to security for good behaviour.

(422) 282. In any case, in which an appeal has been allowed, the Appellate Court, if it thinks further inquiry or additional evidence upon any point bearing upon the guilt or innocence of the appellant to be necessary, *may either make such further inquiry and take such additional evidence itself, or may direct such inquiry to be made and additional evidence to be taken.*

If the Appellate Court takes further evidence and passes judgment and sentence, no fresh right of appeal arises in respect of such sentence.

When the evidence has not been taken before itself, the result of the further inquiry and the additional evidence shall be certified to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

Unless the Appellate Court otherwise directs, the presence of the appellant may be dispensed with when the further inquiry is made or evidence taken.

The provisions of this Act relating to summoning and enforcing the attendance of witnesses and their examination shall, so far as may be, apply to witnesses examined under this section.

This Section 282 contains the provisions of Section 422, Act XXV of 1861. The original Section 422 was altered somewhat by Section 4, Act VIII of 1869. Before the passing of Act VIII of 1869, the sentence could be enhanced by the Appellate Court by this section, after the result of the further inquiry, and the additional evidence being certified to the Appellate Court. That section was superseded by Section 422, under Act VIII of 1869. The main object of the amendments made by the latter section, was to show clearly that no sentence can be enhanced on appeal, even after further evidence has been taken by the direction of the Appellate Court. The provisions of this section give the Appellate Court power to make further inquiry or take additional evidence itself.

In directing further inquiry under this section, the Appellate Court should distinctly state the precise points to be inquired into (*in re Ram Narayn Singh*). The judgment of an Appellate Court, after additional evidence has been taken, must be looked on apparently as an original judgment, and as such is liable to appeal, but not so if it takes further evidence itself.

And additional evidence to be taken.—The Court directed to take such additional evidence need not give any opinion on it, and cannot record any judgment on it (3 B. L. R., 62). And unless the Court of Reference otherwise directs, the presence of the convicted person may be dispensed with when the further inquiry is made and evidence taken, nor is such inquiry to be made or evidence taken in the presence of jurors or assessors.

(426, 439) 283. *No finding or sentence passed by a Court of competent jurisdiction shall be reversed or altered on appeal on account of any error or defect, either in the charge or in the proceedings on or before trial, or*

Finding or sentence when reversible by reason of error or defect in charge or proceedings.

on account of the improper admission or rejection of any evidence, or by any misdirection in any charge to a jury, unless such error or defect has occasioned a failure of justice, either by affecting the due conduct of the prosecution, or by prejudicing the prisoner in his defence.

No irregularity in the proceedings up to trial is a sufficient ground for reversing any judgment, sentence, or order made or passed in a trial properly held.

In case the accused person has been sentenced to a larger amount of punishment than could have been awarded for the offence, which, in the judgment of the Appellate Court, *is proved by the evidence*, the Appellate Court may reduce the punishment within the limits prescribed by the Indian Penal Code, or any law for the time being in force for such offence.

The words "*or before trial*" have been added to the law by the provisions of this section. The second paragraph of this section is also new.

Is proved by the evidence.—A Magistrate having raised the question whether, under this section, a S. J. was not competent to convict of any charge proved on evidence, even if that charge was not specifically laid in the Lower Court, the High Court stated that the Magistrate was quite right in the opinion that this section generally, in effect, enables the Appellate Court to find a prisoner guilty of an offence with which he had not been specifically charged, if the evidence is sufficient to sustain the finding, care being taken that the punishment is reduced to that which the offender should have received for the offence which he actually has committed, and that the accused has not been prejudiced by any error or defect either in the charge or in the proceedings of the Lower Court (3 R. J. P. J., 168).

Shall be reversed or altered.—The High Court is precluded under this section from altering or reversing the sentence passed by the S. C. on account of error of procedure when the prisoner was not substantially prejudiced by such error, and has not been sentenced to a more severe punishment than is awardable for the offence of which he ought properly to have been convicted (High Court, N. W. P., July, 1866).

Of any error or defect.—When the accused has not his witnesses in attendance, and does not apply to the Magistrate to summon them (Sections 252, 253, Act XXV of 1861), the omission of the Magistrate to require him to produce his witnesses does not prejudice the accused or amount to an error or defect calling for interference within this section (11 W. R. C. R., 15).

When the power conferred by Section 46, Act XXV of 1861, is exercised, it is an irregularity on the part of the Judge not to pass a separate sentence under each independent head of the charge; but it is not such an error or defect in consequence of which the High Court could reverse or alter this sentence, under this section (2 Bom. H. C. R., 414).

Where a Magistrate convicted under certain repealed sections of a law, the High Court refused to set aside the conviction, having regard to this section, as the conviction and sentence might have been passed under sections of the Penal Code, and no substantial injury had been done to the accused.

On account of the improper admission, &c.—Section 167, Act I of 1872, deals with the subject here referred to. Compare that section with the provisions of this Section 283.

(427) 284. When any Court has convicted a person of

Procedure in case of conviction by Court not having jurisdiction.

an offence not triable by such Court, the Appellate Court *shall* annul the conviction and sentence of such Court, and direct the trial of the case by a Court of competent jurisdiction.

Under the law as it originally stood, it was optional to the Appellate Court to annul the conviction, but by the present Code it is made compulsory for it so to do. Officers invested with appellate powers under Section 266, *ante*, can exercise the powers conferred by this section. This power was first accorded by Act VIII of 1869.

(428) 285. Judgments, sentences, and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in Sections 272 and 297.

Even if the Session Judge *enhances* the punishment of an accused person, upon appeal, his order is final under this section so far as the appeal is concerned; the only remedy is by petition for revision under Section 297, *post*.

(414) 286. No appeal shall lie from any judgment, sentence, or order of a Criminal Court, except in the cases provided for by this Act or by any law for the time being in force.

Unless otherwise provided, no appeal to lie from judgment, order, or sentence of Criminal Court.

Illustrations.

(a.) There is no appeal against an order refusing to grant compensation, or to grant an enhanced award.

(b.) There is no appeal against an order of a competent Magistrate dismissing a complaint.

(c.) There is no appeal against an order requiring a person to furnish security to keep the peace.

(d.) There is no appeal against an order requiring a person to furnish security to be of good behaviour, when such order is passed by the Magistrate of the District.

(e.) There is no appeal against an order passed under Chapter XXXIX; nor against a report by a jury under that chapter.

(f.) There is no appeal against an order of maintenance.

(g.) There is no appeal against an order placing a name on the jury list.

(h.) There is no appeal against an order by a Court of Session fining a juror or an assessor for non-attendance.

(i.) There is no appeal against the order of a competent Court refusing to order a commitment.

(j.) There is no appeal against an interlocutory order, such as a claim to appear by agent.

(k.) There is no appeal from an order to pay compensation under Section 22 of Act I of 1871 (*An Act to consolidate and amend the law relating to trespasses by cattle*).

CHAPTER XXI.

REFERENCE.

(380) 287. If the Court of Session pass sentence of death, the proceedings shall be referred to the High Court, and the sentence shall not be executed without the confirmation of the High Court.

Sentence of death.

If the accused person is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall, in its judgment, *state the reason why* sentence of death was not passed.

This Chapter XXI contains the provisions of Chapter XXVIII, Act XXV of 1861; paragraphs 3 and 4 of Section 380, Chapter XXV, and Section 445 D, Chapter XXXI of Act XXV of 1861, as amended by Act VIII of 1869.

The High Court, as a Court of Reference, can only deal with cases in which a sentence of death has been passed. This Section 287 in no way overrides the sections of the Penal Code which fix the punishment to be awarded.

The law lays down two different degrees of punishment for murder,—death and transportation. The responsibility of deciding in each case which of these alternative sentences to award rests upon the Judge trying the case. In some cases coming before them, the High Courts have ruled that (1) absence of ill feeling and apparent motive; (2) no eye-witnesses to the murder; (3) the character of the murderer, are not in themselves sufficient grounds for remitting capital punishment.

The conviction of several heinous offences at the same session, if the presiding officer thinks transportation for life is the proper punishment for the aggregate guilt incurred, though too heavy a sentence for any one of the offences, the Judge can find the prisoner guilty of each offence, and then on one of them sentence him to transportation for life, remarking on the others that, as the prisoner had been so sentenced on the first, no sentence was necessary on the others.

State the reason why.—A S. J. is bound to state the grounds upon which he remits a capital sentence to which a prisoner may have rendered himself liable.

(399) 288. In any case so referred, whether tried with assessors or by jury, the High Court may either confirm the sentence or pass any other sentence warranted by law, or may

Power of High Court to confirm sentence or annul conviction.

annul the conviction and order a new trial on the same or an amended charge, or may acquit the accused person.

This section provides that the High Court shall have the same power in cases tried by juries, as in cases tried with the aid of assessors, and so far alters and modifies the former law on this point contained in Section 399 of the old Code.

It is observable that in the event of the conviction of a prisoner by the jury for the crime of murder, and sentence of death following thereon, upon the reference which must be made to the High Court for confirmation of the sentence, the High Court has the power by this section to acquit the prisoner on the *facts*, although, if the prisoner had been sentenced to transportation for life, instead of to death, and had simply himself appealed, the Court would not have been able to disturb the verdict of the jury on the facts (11 W. R., 19).

(400) 289. If the High Court think further inquiry or additional evidence upon any point bearing upon the guilt or innocence of the accused person to be necessary, it may direct such inquiry to be made, or such additional evidence to be taken.

Power to direct further inquiry, &c.

Unless the Court of Reference otherwise directs, the presence of the convicted person may be dispensed with when the further inquiry is made or evidence taken, and neither under this section nor under Section 282 is such inquiry to be made or evidence taken in the presence of jurors or assessors.

The result of the further inquiry and the additional evidence shall be certified to the High Court, and the High Court shall thereupon proceed to pass judgment of acquittal, or to confirm the sentence, or to pass such sentence as it thinks fit.

Vide notes under Section 282, *ante*. This section is not quite the same as Section 400 of the old Code, as under the latter section the power here given of ordering a further inquiry to be made, or additional evidence to be taken, was restricted to cases tried with the aid of assessors.

(401) 290. In every case so referred to the High Court, the confirmation of the sentence, or any new sentence or order passed by the High Court, shall, when such High Court consists of *two or more judges*, be determined and signed by at least two Judges of the Court.

Confirmation or new sentence to be signed by two Judges.

Section 271, *ante*, lays it down, that “when, under the provisions of the law in force, judgments or orders made or passed by the High Court are made or passed, either in appeal, reference, or revision, by a Court consisting of more than one Judge, *any difference of opinion* shall be settled by adding, *when the Court is equally divided*, one or more Judges, and in such event the judgment or order shall follow the opinion of the majority of the Judges.

(445 D) 291. When the High Court of reference, revision, or appeal, consists of a single Judge, such Judge shall have all the powers conferred upon two or more Judges of the High Court by this chapter.

When High Court
consists of one Judge.

CHAPTER XXII.

SUPERINTENDENCE AND REVISION.

The provisions of this chapter were contained in the old law in Chapter XXIX, Sections 405 and 406, and Chapter XXXI, Sections 434, 435, 443.

(443) 292. The High Court may make and issue general rules :—

Power of High Court
to make rules.

For keeping all books, entries, and accounts to be kept in all Criminal Courts subordinate to it, and

For the preparation and transmission of any calendars or statements to be prepared and submitted by such Courts :

And may also frame forms (when not prescribed by this Act) for every proceeding in the said Court for which it thinks that a form should be provided :

And from time to time may alter any such rule or form :

And, with the concurrence of the Local Government, may make and issue general rules for regulating the practice and proceedings of all Criminal Courts subordinate to it, and, with the like sanction, may alter any such rule :

And a High Court not established by Royal Charter may, with the concurrence of the Local Government, make and issue rules for regulating the practice and proceedings of that Court, and, with the like sanction, may alter any such rule :

Provided that such rules and forms be not inconsistent with the provisions of this Act, or of any other law in force for the time being.

All rules framed by the Court, and all repeals and alterations thereof under this section, shall be published in the official Gazette.

(387) 293. All subordinate Courts shall send to the High Court such periodical statements or calendars of trials held by such Courts as the High Court prescribes, exhibiting the offences charged, the offences of which the accused persons are convicted, and the sentences or orders passed upon them.

(405) 294. The High Court may call for and examine the record of *any case tried* by any subordinate Court for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed, and as to the regularity of the proceedings of such Court.

Any case tried.—Trial is defined in Section 4, *ante*, as “the proceedings taken in Court after a charge has been drawn up, and includes the punishment of the offender;” so that proceedings taken in Court *before* a charge has been drawn up, where the accused is discharged, cannot be called for under this section, as this section relates to *tried cases*, and sentences and orders passed in such cases.

This section does not permit the High Court to consider the propriety of the *judgment* passed by the lower Court. That such omission was intentional is shown by the wording of Section 296, *post*. A great difference is made between “sentences or orders” and “judgments”; the one may be altered or set aside for illegality or impropriety, the other can be reversed for illegality alone. And were it not so, it would be difficult to understand the meaning of Section 286, *ante*. That section limits the hearing of appeals; but if the word “propriety” allowed the High Court to take up every case of revision from a Sessions Judge and decide it on its merits, it would give an appeal which the law nowhere contemplates; viz., a second appeal on facts. This Section 294 is limited to “sentences and orders” as distinct from “judgments” (12 B. L. R., 256).

(434) 295. Any Court of Session or Magistrate of the District may, *at all times, call for and examine the record* of any Court subordinate to such Court or Magistrate, for the purpose of satisfying itself or himself as to

Powers of Court of Session and Magistrate to call for record of subordinate Courts.

the legality of any sentence or order passed, and as to the regularity of the proceedings of such subordinate Court.

For the purposes of this section, every Magistrate in a Sessions Division shall be deemed to be subordinate to the Sessions Judge of the Division.

All magisterial officers in a district, except the Magistrate of the District, are subordinate to the Magistrate of the District, whatever their judicial powers may be. (See notes under Section 37, *ante*, and 298, *post*.)

At all times call for, &c.—This section enacts that it shall be lawful to a Court of Session and for a Magistrate to call for and examine the record of any Court subordinate to such Court or Magistrate, for the purpose of satisfying themselves as to the legality of any sentence or order passed, and as to the regularity of the proceedings of such subordinate Court. If the sentence or order is, in the opinion of the Sessions Court or Magistrate, contrary to law, the proceedings are to be referred to the High Court. The Magistrate of a District may be said to hold two different positions in relation to a subordinate Magistrate with full powers—one in respect of cases to be tried, and another in respect of such as have been tried. Before a case is tried, the Magistrate of the District may call for the case and try it himself; and so far an officer exercising the full powers of a Magistrate is subordinate to the Magistrate of the District, in that he cannot refuse to send the case on the requisition of the latter. But in instances in which the case has been tried and disposed of, the Magistrate of the District has no further authority. But the Sessions Judge is the proper officer to whom representations should be made, and he it is who should inquire into and pronounce an opinion on the proceedings (3 R. J. P. J., 49).

All Magistrates being subordinate to the Magistrate of the District (Section 11), this officer has, under Section 295, the power to call for and examine the record of any Magistrate within his District, for the purpose of satisfying himself as to the legality of any sentence or order passed, and as to the regularity of the proceedings of such Magistrate. He is competent to comment upon the proceedings of any Magistrate, and to point out what he considers to be irregularities of procedure. If he is of opinion that the sentence or order is *contrary to law*, or that the punishment is too severe or inadequate, he should forward the case through the Sessions Judge for the orders of the Judicial Commissioner. The taking by the Sessions Judge of a different view of the evidence from that taken by the Magistrate is no ground for a reference under this section.

(434, 435) 296. If the Court of Session or Magistrate of the District is of opinion that the judgment or order is contrary to law, or that the punishment is *too severe, or is inadequate*, such Court or Magistrate may report the proceedings for the orders of the High Court:—

Report to High Court.
Provided that in Session cases, if a Court of Session or

Magistrate of the District considers that a complaint has been improperly dismissed, or that an accused person has been improperly discharged, by a subordinate Court, such Court or Magistrate may direct the accused person to be committed for trial.

Amendment 29 of 1874.—In the second paragraph of Section 296, the words “Provided that” shall be omitted and the following words shall be added (namely):—

“upon the matter of such complaint or of which the accused person has been, in the opinion of the Court or Magistrate, improperly discharged.

“Provided that, if in the opinion of such Court or Magistrate, the evidence shows that some other offence has been committed by the accused person, such Court or Magistrate may direct the Subordinate Court to inquire into such offence.”

This section read with the definition of “Sessions case” in Section 4, *ante*, narrows the power to direct a committal to cases which have been investigated as a preliminary to committal, or in other words, the Court of Session can only order the commitment of an accused person in cases exclusively triable by it. The principle is, that a Sessions Judge has not the power to order a committal in spite of a discharge by a Magistrate who had himself full power to try and convict. Where the Magistrate's powers are restricted to a preliminary inquiry, the Sessions Court has power to control the result of that inquiry (5 N. W. P. H. C. R., 169).

This section contains some of the provisions of Sections 434 and 435, Act XXV of 1861, as amended by Act VIII of 1869. By Section 4, Act VIII of 1869, the following changes were made in the law. The Court of Session could formerly only order the commitment of an accused person discharged by a Magistrate, if he were charged with an offence triable by the Court of Sessions *only*.

The words “*too severe or is inadequate*” have been added to the Code by the present Act X of 1872.

The wording of the proviso to this section evidently limits the powers of the Judge, and the meaning of this proviso is, may be committed for trial upon that matter, of which he has been, in the opinion of the Judge, wrongfully discharged by the Magistrate; or, in other words, committed for trial for some offence with which he was substantially charged in the complaint, or which was specified in the warrant, or which was framed as a formal charge by the Magistrate, at the preliminary hearing.

A Magistrate of a district has power under this section, 296, of dealing with cases triable by a Court of Session, or by a Magistrate of the district in which an accused has been discharged by any Magistrate, and in cases in which a case has been dismissed improperly; and a Magistrate of the district can further direct that the accused be committed for trial.

As the law does not authorize any control or expression of opinion on the part of the S. J., the papers referred to in this section need not be transmitted through him.

An order by a Judge under this section, directing a Magistrate to commit an accused person who has been discharged at a preliminary inquiry, to take his trial at a Court of Session, must specify the particular act constituting the offence charged. The Judge cannot direct a committal for offences with which the accused was in no way charged before the Magistrate (10 B. L. R., 185).

The mere non-service personally of a notice to remove a nuisance is not a sufficient ground for the Court, under this section, to set aside the Magistrate's order, when it appears that the parties did not take objection before the Magistrate, and that they in fact admitted knowledge of the existence of the notice, and sought to excuse their failure to obey it (*Hochan v. Elliott*, Cr. R. V., W. R., p. 4).

297. If, in any case either called for by itself or reported for orders, or which comes to its knowledge, it appears to the High Court that there has been *a material error in any judicial proceeding* of any Court subordinate to it, it shall pass such judgment, sentence, or order thereon as it thinks fit.

Powers of revision. If it considers that an accused person has been improperly discharged, it may order him to be tried, or to be committed for trial;

Power to order commitment. If it considers that the charge has been inconveniently framed, and that the facts of the case show that the prisoner ought to have been convicted of an offence other than that of which he was convicted, it shall pass sentence for the offence of which he ought to have been convicted :

Amendment 30 of 1874.—In the third paragraph of Section 297, for the word “inconveniently” the word “incorrectly” shall be substituted.

Provido to power of altering finding. Provided that if the error in the charge appears materially to have misled and prejudiced the accused person in his defence, the High Court shall annul the conviction and remand the case to the Court below with an amended charge, and the Court below shall thereupon proceed as if it had itself amended that charge.

Power to annul conviction. If the High Court considers that any person convicted by a Magistrate has committed an offence not triable by such Magistrate, it may annul the trial and order a new trial before a competent Court.

Power to annul improper and to pass proper sentence. If it considers that the sentence passed on the accused person is one which cannot legally be passed for the offence of which the accused person has been convicted, or might have been legally convicted upon the facts of the case, it shall annul such sentence and pass a sentence in accordance with law.

If it considers that the sentence passed is too severe, it may pass any lesser sentence warranted by law ; if it considers that the sentence is inadequate, it may pass a proper sentence.

The High Court may, whenever it thinks fit, order that the sentence in any case coming before it as a Court of Revision, be suspended; and that any person imprisoned under such sentence be released on bail, if the offence for which such person has been imprisoned be bailable.

Suspension of sentence.

Except as provided in Sections 328 and 398, no Court other than the High Court, shall alter any sentence or order of any subordinate Court except upon appeal by the parties concerned.

Powers of revision confined to High Court.

No person has any right to be heard before any High Court, in the exercise of its powers of revision, either personally or by agent, but the High Court may, if it thinks fit, hear such person either personally or by agent.

Optional with Court to hear cases.

The first paragraph of this section, and the provisions of Section 64, *ante*, read together, clearly give the High Court power to take cognizance of and revise proceedings before a Magistrate while they are still in the interlocutory state of pending investigation; otherwise there would be no reason why the Legislature should in this way have given the Court express power to remove a case from one tribunal to another, for the purpose of carrying on or continuing the investigation of it.

In any case called for by itself, i. e., where the record is sent for; or *which comes to its knowledge, i. e.*, any case the facts of which are brought to its knowledge, in any sufficient manner, whether by the record or otherwise.

Under this Section 297, the High Court can direct the Magistrate to admit an accused person to bail. The jurisdiction given to the Session Court by Section 390, *post*, has not the effect of excluding the power of the High Court on this point (11 B. L. R., App. 8).

Under this section the High Court has power to revise orders passed by any subordinate Criminal Court in any judicial proceeding for any "material errors," whether of law or fact. It is not quite clear, but the words "*a material error in any judicial proceeding*," in this section appear to be used in a general way, and are not limited to the particular proceedings enumerated in the latter part of this section.

(434) 298. The High Court, the Court of Session, or the Magistrate of the District, may order any subordinate Court to inquire into any complaint which has been dismissed under

Courts may order inquiry.

Section 147.

The Sessions Judge has power under this section to direct a Magistrate to inquire into a complaint dismissed by him under Section 147, *ante*. Section 37 merely limits the powers of interference of the Sessions Court to those expressly given by the Act (see note under that section). This section gives, in the most general terms, the power to three tribunals of directing an investigation of a dismissed complaint. It is, in fact, a mere continuation of Section 295 (8 M. J., 416).

Amendment 31 of 1874.—For Section 298, the following shall be substituted (namely):—

" 298. The High Court or the Court of Session may

direct the Magistrate of the District, by himself or by any of the Magistrates subordinate to him,

"or the Magistrate of the District may direct any subordinate Magistrate,

"to make further inquiry into any complaint which has been dismissed under Section 147."

(406) 299. Whenever a case is revised by the High

Order on revision to
be certified to Lower
Court or District
Magistrate.

Court under this chapter, it shall certify its decision or order to the Court in which the conviction was had or by which the order was passed; or if the conviction or order was passed by a Magistrate other than the Magistrate of the District, to the Magistrate of the District.

The Court or Magistrate to which the High Court certifies its order shall thereupon make such orders as are conformable to the decision of the High Court, and, if necessary, the record shall be amended in accordance therewith :

In cases revised by the High Court under this chapter, the High Court shall not alter or reverse the sentence or order of the Court below, except as herein provided, nor shall it reverse or set aside the verdict of a jury, *unless it is of opinion that the jury was misdirected by the Judge. In that case it may set aside the verdict and direct a new trial, if it think fit to do so.*

The power given to the High Court of setting aside the verdict of a jury and ordering a new trial is now given for the first time, and is similar in principle to the procedure followed in English Courts, where the Court (at *Nisi Prius*) will grant a new trial when they are satisfied that the verdict is in contravention of law, whether the error has arisen from the misdirection of the Judge, or from a misapprehension of the law by the jury, or from a desire on their part to take the exposition of the law into their own hands. As to the power herein given, Mr. Stephen said, "it is nothing more than what the Court for Crown Cases Reserved does in England, in case of a misdirection which leads to a conviction. Why the same course should not be taken in case of a misdirection which leads to an acquittal I cannot conceive." This section must be read with Section 276, *ante* (see notes under that section). The chance of having to try a long and heavy case twice will probably cause Judges to carefully study their charges to the jury.

Provisions of Section
283 to apply.

300. The provisions of Section 283 shall apply to revision orders under this chapter.

PART VII.

EXECUTION.

CHAPTER XXIII.

The provisions of Sections 44 to 48, and 50 to 54, Section 61, Sections 222, 223, 383 to 385, and Section 433, Act XXV of 1861, as amended by Act VIII of 1869. Section 13, Clause 2 of Bombay Regulation XIV of 1827, and Sections 10, 11, and 12 of Act VI of 1864, have been brought together and placed in this Chapter XXIII, under the head of Execution, and Section 315 of the present Act has been added as a new section to the C. C. P.

It would be as well, in connection with the sections of the chapter on warrants and execution, to work them with the provisions laid down in Act V of 1871.

(383) 301. In cases referred by the Court of Session for the confirmation of a sentence of death by the High Court, the proper officer of the High Court shall, without delay, after the order of confirmation or other order has been made by the High Court, send a copy of the order under the seal of the High Court, and attested with his official signature, to the Court of Session.

Such Court shall, if the sentence be confirmed or commuted, *issue a warrant* to the officer in charge of the jail in which the prisoner is confined, to cause the sentence or order to be carried into execution; or, in the case of any other orders, shall cause such orders to be carried into effect.

"Issue a Warrant."—Under the provisions of the old Act the Calcutta High Court ruled that it was not necessary for the Sessions Judge to issue a separate warrant for each prisoner sentenced, but that one warrant might include all the parties involved in one sentence. This ruling applies to the provisions of the present Section, 301. Nevertheless, though by the actual wording of the law a separate warrant is not necessary, in many cases a separate warrant might be found more convenient, and there is nothing in the law *against* issuing a separate warrant in the case of each prisoner sentenced.

(384) 302. In cases tried by the Court of Session, the Court shall forward a copy of its finding and sentence to the Magistrate of the District in which the trial was held.

Court of Session to send copy of finding and sentence to District Magistrate.

If the accused person is sentenced to transportation, imprisonment, or whipping, the Court shall forthwith forward him, with a warrant for the execution of the sentence, to the officer in charge of the jail of the district in which the trial was held.

Warrant of execution.

The warrant shall state the offence of which the accused person has been convicted, and the period during which he is to be transported or imprisoned, and the nature of the imprisonment or other punishment.

In cases tried by any Court inferior to a Court of Session, the Court passing the sentence shall forthwith forward the accused person, with a similar warrant for the execution of the sentence, to the officer in charge of the jail of the district in which the trial was held.

Procedure after sentence passed by Court inferior to Session Court.

Amendment 32 of 1874.—For the fourth paragraph of Section 302, the following section shall be substituted (namely) :—

“ 302A. In cases tried by any Court inferior to a Court of Session, where the accused person is sentenced to imprisonment, the Court shall forthwith forward him with a similar warrant for the execution of the sentence to the officer in charge of the jail of the District in which the trial was held :

“ But where the accused person is sentenced to whipping, the sentence may be executed at such place and time as the Court may direct.”

The three last paragraphs of this section were added to the Code by Act VIII of 1869 ; the only alteration made to the provisions of this section by the present enactment, is the addition of the words *transportation* and *whipping* in the body of this section.

(222) 303. Every warrant for the commitment of a person to custody shall be in writing and signed and sealed by the Judge or Magistrate who issues it, and shall be directed to some jailer or other officer or person having authority to receive and keep prisoners, and shall be in the form

Form and direction of warrant of commitment.

(C or D, as the case may be) given in the second schedule to this Act, or to the like effect.

When a warrant contains a wrong date, fixing the time from which commitment under it runs, it may be amended, as the amendment refers only to the time from which the sentence shall commence, and not to the sentence itself (W. R., Cr. L., No. 679, 1865).

In calculating sentences of imprisonment of soldiers, the rule laid down in paragraph 776, Queen's Regulations, is to be followed, *i.e.*, that the day on which the sentence is signed, and the day of release shall both be included. This method of reckoning sentences is further enjoined in the Bengal Military Regulations, Section 53, paragraph 27.

(223) 304. The warrant of commitment shall be lodged with the jailer, if he be in the jail; and if he be not in the jail, with his deputy.

Warrant with whom to be lodged.

If the jailer has no deputy, the warrant may be lodged with any officer of the jail then being in the jail.

(385) 305. Upon the receipt of a warrant under Section 301 or 302, the officer in charge of the jail shall cause the sentence to be executed, and shall return the warrant, when the sentence has been fully executed, to the Court from which it issued, with an endorsement under his signature, certifying the manner in which the sentence has been executed.

Execution of sentence under Section 301 or 302.

306. If a woman sentenced to death be found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may commute the sentence.

Postponement of capital sentence on pregnant women.

This section is taken from the Provision of Bom. Reg. XIV of 1827, Section 13, Clause 2.

(61) 307. Whenever an offender is sentenced to pay a fine, the Court which sentences him may issue a warrant for the levy of the amount by distress and sale of any movable property belonging to the offender, whether or not the offence be punishable with fine only, and whether or not the sentence direct that, in default of payment of the fine, the offender shall suffer imprisonment.

Levy of fine.

Such warrant may be executed within the jurisdiction of the Court that issued it, and it shall authorize the distress and sale of any movable property belonging to the offender without the jurisdiction of the said Court, when endorsed by the Magistrate of the District in which such property is situated.

This section shall not apply to cases in which any special

Section to what cases applicable. procedure is laid down by any special or local law, in force for the time being, for the recovery of any fine, but shall apply to cases in which no such procedure is laid down, and to all fines not levied when this Act comes into force, but which might have been levied under this section if it had been in force when they were imposed.

The warrant may be issued either by the Judge or Magistrate who passes the sentence, or by Who may issue warrant. his successor in office.

The provisions of Section 5 of the "General Clauses Act, 1868," lay it down that "The provisions of Sections 63 to 70, both inclusive, of the Indian Penal Code, and of Section 61 of the Code of Criminal Procedure (*i.e.*, this Section 307 of Act X, 1872), shall apply to all fines imposed under the authority of any Act hereafter to be passed, unless such Act shall contain an express provision to the contrary."

Movable Property, &c.—Under this section the movable property of an offender can be distrained and sold wherever it may be found, provided that the warrant be endorsed by the Magistrate of the District in which it is situated. Formerly, under Act XXV of 1861, only property within the district in which the prisoner was sentenced could be so distrained and sold; the provisions of the present section were first introduced by Act VIII of 1869. The limitation within which realization of fines, under Section 61, Act XXV of 1861, was imposed, was obviously a great bar to realizing fines at all. A man had simply to remove his property out of the jurisdiction in which he was tried into the next district, and it could not be touched. Movable property outside the jurisdiction of the Court is only liable if the Magistrate in whose jurisdiction it lies will endorse the warrant. There is no apparent reason why, if fine cannot be realized from movable property, the offender's immovable property should not be made liable.

On a reference as to whether the restriction for the recovery of fines to movable property applied only during the lifetime of the offender, and whether the fine could after his death be recovered under Section 70, P. C., from his immovable property, the Court was of opinion that the law had only provided for the distress and sale of movable property, and that there was no way in which immovable property could be made liable (*Reg. v. Lalla Wákwár*, 5 Bo. H. C. R., part II, p. 63). This ruling is at variance with C. L., 4 W. R., 6.

Criminal Courts are empowered by this section, in certain cases, to issue a warrant "for the levy of the amount by distress and sale" of any movable property belonging to the offender. This warrant should be directed to a Police Officer, and the authority issuing it, following the analogy of English law in said cases, should set a time for sale and return of the warrant. If no one claims property distrained, the Police have power of selling it within the time that should be specified in the warrant, without any previous reference to a Magistrate. If a claimant comes forward, his ownership of property distrained must be determined by Magistrate. If at any time subsequent to the return of the warrant, and within the period of six years from passing of the sentence, the fine or any part thereof remains unpaid (Section 70, P. C.), and Magistrate, from information gained in any way, has reason to think that any movable property belonging to offender

is within his jurisdiction, he should issue a fresh warrant for the attachment and sale of the property within a specified period, returnable within a certain time (C. H. C., Cir. 8 of 1864).

An offender who has undergone the full term of imprisonment to which he has been sentenced in default of a payment of a fine, is still liable, under this section, to have the amount of the fine levied by distress and sale of any movable property belonging to him.

In every case in which an offender is sentenced to fine, the Court which sentences the offender may issue a warrant for the levy of the amount by distress and sale. The successor in office of a Judge or Magistrate may levy a fine imposed by his predecessor. But the Court which levies the fine must be the same as the Court which imposed it (Cr. R., 9 W. R., p. 50).

According to the argument used by the full Bench of the High Court, it appears that if a claimant appear questioning the ownership of property attached under this section, a Judicial Officer commits no error in law by refusing adjudication, as the law does not expressly empower him to decide on such claims, as the claimants are not barred by such sale, and may bring a suit in Civil Court against purchasers to establish their right (7 W. R. C. R., p. 35).

(44) 308. Whenever a Criminal Court imposes a fine under *any law in force for the time being*, or confirms *in appeal* or revision a sentence of such fine, or a sentence of which such fine forms a part, the Court may order the whole or any part of the fine *to be paid in compensation*,

- (1.) For expenses properly incurred in the prosecution,
(2.) For the offence complained of, where such offence can, in the opinion of the Court, be compensated by money.

Such payment shall be made, as the Court thinks fit, to or for the benefit of the *complainant, or the person injured, or both*.

If the fine be awarded by a Court whose decision is subject to appeal or revision, the amount awarded shall not be paid until the period prescribed for presentation of the appeal has elapsed, or, if an appeal be presented, till after the decision of the appeal.

In any subsequent civil proceedings relating to the same matter, the Court shall take into account any sum which may have been awarded under this section.

This section makes its provisions applicable to *appeals*, as well as revision, and to fines under any law in force for the time being, and to the confirmation in appeal or revision of a sentence of such fine, so that now a Court of Appeal or Revision has the power of ordering the whole or part of a fine to be paid in compensation. This was not so under this section as it originally stood. Further, under the old law the amount awarded was not to be paid until a period of two months had elapsed from the date of

the award, whereas now the provisions of paragraph 5 of this section have been substituted for the above period.

There is no mode of compelling a person, to whom a fine has been paid as compensation awarded under this section, to refund the same on reversal of award. The proper course is to hold the amount of fine for the time specified under this section. If an appeal be preferred, the Appellate Court may order the sentence to be suspended as to paying over the fine to the party injured, until after decision of the appeal. The Court of First Instance should always, when an order for payment of fine has been made, call the attention of the Appellate Court to the fact, so that the order for payment over may be suspended.

To be paid in compensation.—Under Section 44 of Act XXV, 1861, the Court could only award compensation for any loss caused to the person who had suffered by an offence, or for any special damage of a pecuniary nature which might have resulted to the complainant in consequence of the offence. Under the present section the Court can award compensation when in its opinion the offence complained of can be compensated by money, and can direct payment to be made to or for the benefit of the complainant, or the person injured, or both. The award of compensation referred to in this section should be a part of the sentence and order made upon a conviction for an offence of the nature specified therein, and should be founded upon a statement of loss, damage, or expenses, as the case may be, ascertained at the trial.

Complainant, person injured, or both.—Under the present section compensation can be awarded to *any* person shown to have been injured. *In re* Rughoneath Dass *v.* Chuckerdhum Rant, and others, compensation was awarded to one Ram Behara for damage done by cattle trespass. It was objected that Ram Bchara was no party to the case, never appeared in it at all, made no claim for compensation, and ought not to have been awarded any. The objection was overruled for the reason above stated.

The Calcutta H. C., in their No. 314 of 1864, said that the resort to whipping renders it impossible to award compensation to the person suffering loss by the offence punished. But compensation to the sufferer is not the primary object of the punishments of the Penal Code, which, indeed, takes no notice of such compensation as one of the objects of punishment. It is clear from the wording of this section, that the intention and meaning of this section are not, that fine should be inflicted in order that compensation may be awarded, but that when fine is imposed, upon conviction of any offence made punishable by fine, such fine may be awarded as compensation to the person who suffered loss by such offence, &c. &c. The Court are therefore of opinion that it was contemplated by the Legislature that compensation could only be awarded in those cases in which fine was imposed, and that where fine was not part of the punishment, compensation could not be awarded. It follows, of course, from the above view, that in cases where whipping is awarded in lieu of any other punishment, compensation cannot be obtained through means of the Criminal Court under this section, and can only be obtained by means of a civil action. (From Registrar, N. W. P., No. 972, of 1864, Circular 63 of 1864, J. C. O.)

Under Chapter VI, Court Fees Act, if a person is convicted of an offence

other than an offence for which Police Officers may arrest without warrant, the Court must order him to repay the fee paid by the complainant on preferring his petition, or on having his complaint reduced into writing, as the case may be. There is a distinction between the provisions of Chapter VI (C. F. Act) and this section, C. C. P. Under the latter it is optional in the Court to allow compensation. But under the former it is compulsory on it to direct the accused person to repay the fee paid by the complainant. With reference to a question whether fees repaid to a complainant under Section 31, Act VII of 1870, should be paid over immediately on the sentence being pronounced, or retained in deposit, the H. C. Madras were of opinion that the order to repay was an integral part of the sentence, and that the fee should be treated as a fine imposed by the Court (H. C. Madras, No. 3304 of 1870).

An award of compensation to the widow of a person who died in consequence of a fall into a pit, negligently dug by the accused, from the fine imposed on the latter, is illegal. Act XIII of 1865, modelled upon Lord Campbell's Act, specially provided for compensation to the heirs of persons killed by actionable wrong, and the Calcutta High Court in *Reg. v. Lall Singh* (10 Calc. H. R., Cr. R., 39) has distinctly ruled that this section of the Criminal Procedure Code does not apply to cases like the present (*Reg. v. Shivbasapa*, 7 Bo. H. C. R., 73).

(45) 309. In every case punishable under *any law in force* with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, the Criminal Courts shall be guided by the provisions of Sections 64 and 65 of the Indian Penal Code in awarding the period of imprisonment in default of payment of the fine :

Provided that, in no case decided by a Magistrate, where imprisonment shall have been awarded as part of the substantive sentence, shall the period of imprisonment awarded in default of payment of the fine exceed one-fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

Where a person is sentenced to fine only, the Magistrate may award such term of imprisonment in default of payment of fine as is allowed by law, provided the amount *does not exceed the Magistrate's powers under this Act.*

Any law in force.—This section, as well as the preceding one, makes applicable the provisions of Sections 64 and 65 I. P. C., not only to offences falling under that code as defined in Section 40 P. C., but “in

every case punishable under any law in force with imprisonment as well as fine in which the offender is sentenced to a fine."

Does not exceed, &c.—In cases where the punishment consists only of fine, it is provided that the imprisonment in default of payment of fine shall not exceed the imprisonment the Court is competent to inflict as a substantive sentence.

(9 of Act VI, 1864) 310. When the punishment of whipping is awarded in addition to imprisonment, by a Court whose sentence is open to revision by a Superior Court, the whipping shall not be inflicted until fifteen days from the date of such sentence, or, if an appeal be made within that time, until the sentence is confirmed by the Superior Court; but the whipping *shall be inflicted immediately on the expiry of the fifteen days*, or, in case of an appeal, immediately on the receipt of the order of the Appellate Court confirming the sentence.

Whipping, if awarded in addition to imprisonment, when to be inflicted.

This section has been inserted into the C. C. P. from Act VI of 1864, Section 9.

In cases in which sentence of whipping only is passed by a Magistrate of the first class there is no appeal. (*Vide* Sections 273, 274, *ante*.)

Modern Acts of Parliament authorize the punishment of whipping, and offenders may be directed to be whipped in addition to any imprisonment awarded. By 1 Geo. IV, c. 57, however, judgment shall in no case be given, that any female convicted of any offence shall be whipped either publicly or privately. Full particulars as to procedure can be gained by referring to the Criminal Consolidation Acts of 1861; also 25 and 26 Vic., c. 18, and 26 and 27 Vic., c. 44, an Act passed in the year 1863. *Vide* also Steph. Com., vol. iv, c. xxiii, p. 538.

The *Pull Mall Budget* of the 12th July, 1872, has the following very pertinent remarks on the subject of whipping and the Prison Congress:—"The fact which stares us in the face is, that when we earnestly wish to abate a crime we flog the criminal. The same necessity made itself felt on a rather larger scale in one very curious and instructive case. The Indian Government is deservedly proud of its system of criminal law, and no doubt the Indian Penal Code is very nearly the best and most complete piece of legislation accomplished by Englishmen. As that code came from the hands of its framers, it provided for no punishment save of the class with which the Prison Congress is occupied; but its enactment was followed by a sudden and most alarming increase of crime in certain parts of the country, which the most experienced officials confidently attributed to the total abolition of penal flogging. Fortunately, in one sense, the grave difficulties which attend imprisonment in a tropical climate made themselves felt very much about the same time, and it became more and more evident that no ingenuities of prison construction could prevent that natural law from asserting itself, under which even moderate collections of men in hot countries are exposed to the deadliest epidemics. The Indian Government would, doubtless, have preferred to adhere to the most advanced principles, but it could not inflict wholesale capital punishment for the sake of abolishing the 'lash,' and, accordingly, it ventured on a timid and partial return to that discredited penalty, with the happiest effects on the spread of crime."

Shall be inflicted, &c.—The N. W. P. N. A. in their No. 8 dg. 11th April,

1866, *held* that the punishment of whipping, when postponed for fifteen days under this section, must be inflicted immediately on expiration of the said period, otherwise it cannot legally be inflicted afterwards. The principle laid down in this ruling has been upheld by the High Courts of Madras and Bombay.

(10 of Act VI, 1864) 311. In the case of a person of or over sixteen years of age, the punishment of whipping shall be inflicted with such instrument, in such mode, and on such part of the person as the Local Government directs, and, in the case of a person under sixteen years of age, it shall be inflicted in the way of school discipline with a light rattan.

In no case, if the cat-o'-nine-tails be the instrument employed, shall the punishment of whipping exceed one hundred and fifty lashes, or, if the rattan be employed, shall the punishment exceed thirty stripes.

The punishment shall be inflicted in the presence of a Magistrate, and also, unless the Court which passed the sentence otherwise orders, in the presence of a Medical Officer.

Amendment 33 of 1874.—In the third paragraph of Section 311, after the word “Magistrate,” the words “or a Superintendent of a Jail,” shall be inserted.

And in the first and second paragraphs of Section 312, after the word “Magistrate,” the words “or Superintendent,” shall be inserted.

This section is taken from Act VI, 1864, Section 10. The only alteration is that the words “of a person of or over” and “under sixteen years of age,” have been substituted for the terms “adult” and “juvenile offender.”

(11 of Act VI, 1864) 312. No sentence of whipping shall be carried into execution unless a Medical Officer, if present, certifies, or if there is not a Medical Officer present, unless it appears to the Magistrate present, that the offender is in a fit state of health to undergo the punishment.

If, during the execution of sentence of whipping, a Medical Officer certifies, or it appears to the Magistrate present that the offender is not in a fit state of health to undergo the remainder of the punishment, *the whipping shall be finally stopped.*

No sentence of whipping shall be executed by instalments.

This section is taken from Act VI, 1864, Section 11.

The whipping shall be finally stopped.—Where a prisoner sentenced to corporal punishment under Act VI of 1864 is unable to suffer the whole number of stripes ordered, the Court may discharge him after infliction of part, though this amount to a modifying of sentence. (C. H. C. letter No. 16; Letter No. 1182½ from D. C. Maunbhoom to J. C. Chota Nagpore.)

(12 of Act VI, 1864) 313. In any case in which, under Section 312, a sentence of whipping is, wholly or partially, prevented from being carried into execution, the offender shall be kept in custody till the Court which passed the sentence can revise it, and the said Court may, at its discretion, either order the discharge of such offender, or sentence him in lieu of whipping, or in lieu of so much of the sentence of whipping as was not carried out, to imprisonment for any period, which may be in addition to any other punishment to which he may have been sentenced for the same offence :

Procedure if punishment cannot be inflicted under the last section.

Provided that the whole period of imprisonment shall not exceed that to which the offender is liable by law, or that which the said Court is competent to award.

This section is taken from Act VI of 1864, Section 12. This section provides that when a person sentenced to whipping is incapable on medical grounds of undergoing the whole of the sentence, the Court may pass any other sentence in lieu of the part of the whipping not undergone.

(46) 314. When a person is convicted at one trial of two or more offences punishable under the same or different sections of any law for the time being, the Court may sentence him for the offences of which he has been convicted to the several penalties prescribed by such enactment or enactments which such Court is competent to inflict; such penalties, when consisting of imprisonment or transportation, to commence the one after the expiration of the other.

Sentence in cases of simultaneous conviction of several offences.

It shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court :

Maximum term of imprisonment. Provided that in no case shall the person be sentenced to imprisonment for a longer period than fourteen years :

Provided also, that, if the case be tried by a Magistrate, other than a Magistrate acting under Section 36, the punishment shall not in the aggregate exceed twice the amount of punishment which he is by his ordinary jurisdiction competent to inflict.

The wording of this section has been slightly altered from the wording as it originally stood : for the words *one time*, in line one, "*one trial*" have been substituted ; and for *Indian Penal Code*, the words "*any law for the time being in force*" have been substituted ; and "*or transportation*" has been added after *imprisonment*.

It is clear from this section, read with paragraph 1 of Section 454, and the illustrations thereto, that in the event of the aggregate punishment inflicted upon a person for distinct offences exceeding seven years' imprisonment, he can be sentenced to transportation under Section 59 of the Penal Code. The Court cannot commute the sentence *after* a sentence of imprisonment has been passed, and, it follows, cannot commute it at all except for offences for which the law awards *seven years' imprisonment or upwards*. (*Vide* notes under Section 59, I. P. C.)

Section 71, I. P. C., deals with the limit of punishment of offence which is made up of several offences. (*Vide* notes under that section, as to verdict to be entered when all the facts in evidence form portion of one entire offence.)

This section contemplates two offences covered by two different sets of facts ; and if two such simultaneous offences legitimately arise on the evidence for both of which stripes form part of the punishment, they can be awarded, but not more than thirty can be inflicted. (*Vide* Section 311, *ante*). The postponement of the second sentence, if not against the letter, is against the spirit of Act VI, 1864. For two such separate offences under the P. C., a sentence of imprisonment up to fourteen years, and one of stripes, may be separately awarded (para. 3, letter 378, April, 1865). The limit of fourteen years' imprisonment, fixed by this section, has reference to sentences passed simultaneously, or upon charges tried simultaneously. Under Section 317, the Sessions Judge has power to sentence a person already under sentence of imprisonment to transportation without any such restriction. There is, therefore, no ground for supposing that sentences of imprisonment cannot be accumulated before a period of fourteen years (3 R. C. C. R., 5).

When there are in the indictment two separate offences, supported by separate and distinct evidence, a separate sentence should be passed for each offence, the punishment under the second to commence on the expiry of the first, as laid down in this section. If, however, there are two or more offences supported by the same evidence, or very nearly so, a verdict of guilty should be entered on the offence covered by the greater portion of the evidence, as the gravest in the eye of the law, and a verdict of not guilty on the other counts. On appeal, the High Court can, if

they think fit, find the prisoner guilty on any count on which he may have been charged and acquitted below, and reduce the punishment proportionately (3 R. J. P. J., 168).

When a person who has *not* been previously convicted (using the term in the sense in which it is used in Section 4, Act VI, 1864) is convicted at one time of two or more offences, it is illegal to sentence him to whipping for one of these offences in *addition* to imprisonment or fine for the other or others, but it is not illegal to sentence him to *one* whipping in lieu of all other punishment. When a person who *has* been previously convicted is convicted at one time of two or more offences, he may be punished with one, but only *one*, whipping in *addition* to any of the punishments to which, under this section of C. C. P., he may be liable. (Full Bench, Calcutta H. C., dated 12th March, 1868.)

A majority of the full Bench of the Madras High Court have ruled that the effect of the Whipping Act is to make whipping a punishment under the Penal Code, and that it is therefore competent to a Magistrate on a second conviction at the same time to award a sentence of whipping either in substitution for or in addition to imprisonment, subject to the restriction in the Whipping Act itself (5 M. J., 243).

Two convictions of entirely different offences committed by the same individual on different dates and in different places, the punishments awarded necessarily form separate and distinct sentences, and if each are within limit of one month, and cases have been tried by a Magistrate with full powers, no appeal lies. Separate sentences for separate offences, but at one time, cannot be lumped together to give an appeal. There is nothing in this section to bear out the construction that any number of different penalties, imposed for different offences tried at the same time, make only one sentence; on the contrary, the Court convicting a prisoner of several offences is bound to sentence such prisoner to the several penalties prescribed by law, the one penalty commencing after the expiry of the other; and the only limit (under a certain proviso) is the extent of punishment which the particular Court before which the cases are tried is competent to inflict. The object of this section is to award a specific punishment for each particular offence of which the accused may be proved guilty when all the charges are tried against him together, so that in case some one or other of the charges break down on appeal, the amount of punishment to be remitted may be known (6 R. C. C. R., 2).

The principle contained in the provisions of this section, and laid down in the rulings of the High Courts, is, that where acts are connected or form substantially part of one and the same transaction, and the evidence with reference to these acts was as material on one charge as the other, the whole transaction must be viewed as *one* offence, there being no part of the evidence on which conviction on one charge could take place which was not as necessarily and properly evidence on the other charges; e.g., a person cannot at one and the same time be punished under 142 and 147 I. P. C.; nor 142 and 304 I. P. C.; nor 379 and 429 I. P. C.; nor 379 and 457 I. P. C., &c. &c.

315. Whoever, having been convicted of an offence

punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards, is again accused of any offence *punishable* under either of those chapters with imprisonment for a term of three years or upwards, shall ordinarily, if the Magistrate considers him an habitual offender, be committed to the Court of Session :

Trial of previously convicted persons.

Provided that, in districts in which the Magistrate of the District has been invested with powers under Section 36, the accused person may be placed on his trial before such Magistrate of the District.

Proviso.

Punishable.—It is not necessary that a person should actually have undergone imprisonment for three years, as long as the *offence* of which he has been convicted is *punishable* with imprisonment for a term of three years.

This section has been added to the C. C. P. by the present enactment, Act X of 1872.

In order to render Section 75 of the Penal Code operative, it has been provided that persons coming within its provisions shall, if the Magistrate considers them habitual offenders, ordinarily be committed (Section 315). It is obvious that the sentence to be passed on a second conviction ought in some measure to depend upon the nature of the previous crime ; Magistrates, therefore, will be expected to use a discretion in making commitments on a second conviction.

The Punjab Chief Court have *held*, that a Magistrate may, at any stage of the proceedings, without framing a charge, or completing a preliminary inquiry, send the accused to the Magistrate of the District, to be placed upon his trial (8 P. R. Cr. J., 12).

(47) 316. When sentence is passed on *escaped convict* for such escape or for any other offence (Section 23, Act V of 1871), the Court may direct the sentence to take effect immediately, or after such convict has suffered imprisonment or transportation, as the case may be, for a further period equal to that which remained unexpired of his former sentence at the time of his escape.

Currency of sentence on escaped convicts.

Escaped Convict.—This section deals only with the case of "*escaped convicts*," within which category a prisoner escaping from legal custody previous to trial does not come. The law merely says that the punishment under this section is in addition to any punishment to which the person is liable for the offence with which he was charged, without pre-

scribing anything regarding the priority in point of time of the actual effect of the different sentences.

(48) 317. When sentence is passed on a person already under sentence of imprisonment or transportation, and the sentence be for imprisonment or transportation, the Court shall direct that such imprisonment *or transportation* shall commence at the expiration of the imprisonment or transportation to which such person has been previously sentenced,

Or, if he is undergoing a sentence of imprisonment, and the sentence, on such subsequent conviction, be for transportation, the Court may direct that the sentence shall commence immediately, or at the expiration of the imprisonment to which such person has been previously sentenced :

Provided that nothing in this section shall be held to excuse such person from any part of the punishment to which he is liable upon such former or subsequent conviction.

The words *or transportation* have been added to the body of this section after the words "for imprisonment" by the present Act X of 1872.

Where a Court, in ignorance of a prior sentence then in force, imposes a term of imprisonment, it is competent, of its own motion, on discovery of the mistake, to amend its own order, so far as to direct when it shall begin to have effect, for the amendment only refers to the time at which the sentence shall commence, and not to the sentence itself (No. 679, July 15th, 1865, H. C., Calcutta).

(433) 318. When any person under the age of sixteen years is sentenced by any Criminal Court to imprisonment for any offence, such Court may direct that such offender, instead of being imprisoned in the criminal jail, shall be confined in any reformatory established by the Local Government as a fit place for confinement, in which there are means of suitable discipline and of training in some branch of useful industry, or which is kept by a person willing to obey such rules as the Government prescribes with regard to the discipline and training of persons confined therein.

All persons confined under this section shall be subject to the rules so prescribed by Government.

(50, 51) 319. The Governor-General of India in Council may from time to time appoint a place or places within British India to which persons sentenced to trans-

Governor-General in Council to appoint places to which persons sentenced to transportation may be sent.

Local Government to direct removal of such persons to places appointed.

portation shall be sent : the Local Government, or some officer duly authorized by such Government, shall give orders for the removal of such persons to the place or places so appointed ; and no sentence of transportation shall specify the place to which the person sentenced is to be transported.

By notification No. 1644, of 28th October, 1869, at p. 412, Part I, No. 44, of *Gazette of India*. Under the provisions of this section the Governor-General in Council appointed the following jails in the North-Western Provinces as places to which persons sentenced to transportation may be sent :—

The central jails at Benares, Allahabad, Agra, Furruckabad, Bareilly, and Meerut ; and in September, 1872, the Governor-General in Council appointed the central jail at Lucknow to be a place to which persons under sentence of transportation may be sent.

(52) 320. When sentence of transportation is passed on a person already undergoing transportation under a sentence previously passed for another offence, it shall not be necessary for the Local Government to order his removal from the place in which he is undergoing transportation.

Person sentenced to transportation while undergoing transportation under previous sentence, need not be removed.

(53) 321. When any person is sentenced to death, the sentence shall direct that *he be hanged by the neck till he is dead*.

Sentence of death.

He be hanged by the neck till he is dead.—The words “hanged by the neck till he is dead” should be inserted in the sentence. It is necessary to refer for confirmation of the High Court capital sentences. Capital sentence should be pronounced on a conviction for murder, even if the accused be pregnant, although the execution of the sentence should be deferred till after delivery (*R. v. Panhee Aurut*, 15 W. R., 66). With reference to what was the custom in such cases formerly in India, see Section 302 of the I. P. C., and note thereto ; also Chev. M. J., 710—712.

With reference to postponement of capital sentences on pregnant women, see Section 306, *ante*.

(54) 322. When any person has been sentenced to punishment for an offence, the Governor-General of India in Council, or the Local Government, may, at any time, without conditions, or upon any conditions which the person sentenced accepts, remit the whole or any part of the punishment to which he has been sentenced.

Power to remit punishment.

If the person to whom a pardon has been given fails to

fulfil the conditions prescribed by the Governor-General of India in Council, or the Local Government, the Governor-General of India in Council or the Local Government, as the case may be, may withdraw such pardon ; whereupon such person shall be remanded to undergo the unexpired portion of his sentence.

The Governor-General of India in Council, or the Local Government, may also, without the consent of the person sentenced, in substitution for the sentence passed according to law, commute any one of the following sentences for any other mentioned after it :—

Death, transportation, penal servitude, imprisonment.

Amendment 34 of 1874.—To the first clause of Section 322, the following words shall be added (namely) :—

“or grant a reprieve or respite in respect of such sentence,”
and the following clauses shall be added to the same section (namely) :—

“This section applies to all punishments inflicted by the High Court. Provided that nothing herein contained shall be deemed to interfere with the right of Her Majesty to grant pardons, reprieves, respites, or remissions of punishment :

“When any fine or forfeiture is imposed on any person for any offence, the Governor-General in Council or the Local Government may (subject to the provisions of Section 308) direct that a share or proportion of such fine be paid over to the prosecutor towards defraying his expenses, as the Governor-General in Council or the Local Government thinks fit.”

The Governor-General in Council, and the Local Government, is empowered to revoke a conditional pardon granted by him or by it (Section 322). This is to meet the difficulty of proving in a Court of Justice that a man knows more than he pretends to know.

This section contains, in its first paragraph, the provisions of the old Section 54, Act XXV of 1861. *In re R. v. Bora Dondapani*, 7 M. J., 295, it was held that that section applied only to cases in which final sentence had been pronounced, not to those subject to the final revision of the High Court.

If the S. J. has strong reasons for dissenting from the verdict of the jury in any case, he should, after passing sentence, make special reference to the Court for the order of Government under this section (5 R. J. P. J., 35). “All states,” Maine tells us in his “Ancient Law,” “have in reserve an ultimate remedy for the miscarriage of law in the prerogative of pardon, universally lodged with the Chief Magistrate.”

By notification No. 601, Judicial of 8th May, 1872, the Governor-General in Council, under Act XXXII of 1867, delegated to the Chief Commissioner of British Burmah the power conferred on a Local Government by Section 54, Act XXV of 1861. The first paragraph of this Section 322 contains the provisions of the old Section 54, above quoted.

PART VIII.

EVIDENCE.

CHAPTER XXIV.

SPECIAL RULES OF EVIDENCE IN CRIMINAL CASES.

Probably in India the truth may be arrived at far more successfully by a well-conducted process of reasoning from a chain of circumstances than the most positive testimony of eye-witnesses, considering their love of exaggeration and inability of drawing correct conclusions from what they really see ; and, moreover, it is a common custom all over India for natives to swear they have actually *seen* that which they have only really heard. There is no popular sanction to stimulate a native to tell the truth ; no disgrace attaches to perjury. The fear of punishment has no influence on a witness, for the chance in his favour of going undetected, or if detected, unconvicted and unpunished, is quite fifty per cent. Some customary damnatory oath might bind him, but these are disallowed on the ground of general utility, and as contrary to justice and decency. The only constant guide to the tongue of a native is his interest ; other tests may fail of the credibility of testimony—this never.

The principal grounds of incompetency to give evidence at the present time in England are : (1) *Want of understanding*.—Lunatics are incompetent, unless they show that they are able to give an intelligent account of things which they have seen, and understand the nature of an oath. Children are incompetent unless they show that they understand the nature of an oath. (2) *Interest*.—The only case of incompetency on this ground still remaining, is that in criminal proceedings, other than a charge by one of them against the other, the husband or wife of the accused is incompetent to give evidence. The law is different in India (Act I of 1872). (3) *Perverse religious opinions*.—Atheists are no longer incompetent since 32 and 33 Vic., c. 68 ; but it is probable that a witness shown to believe in a Divine *reward* for falsehood in the matter in question might still be objected to (Best Ev., 145 ; B. E. J., 180). The following are the most usual species of inculpatory evidence in criminal cases :—(1.) Real evidence, or evidence from things. (2.) Evidence derived from the *antecedent* conduct or position of the accused ; such as peculiar motives, means, or facilities for committing the offence ; preparations or previous attempts to commit it. (3.) Evidence derived from the *subsequent* conduct of the accused ; such as sudden change in his life or circumstances, silence when accused, false or evasive statements made by him, flight from justice, indications of fear. (4.) Confessional evidence (Best L. and F.).

(368) 323. The examination of a Civil Surgeon, or other medical witness, taken and duly attested by a Magistrate, may be given in evidence in any criminal trial, although the person examined is not called as a witness.

The Court may summon such Civil Surgeon, or other medical witness, if it see sufficient cause for doing so.

In Act XXV of 1861, after this section, "Evidence of medical witness," came a section regarding *examination of witnesses taken and attested by Magistrate when admissible*. The provisions of this section have been omitted from the present Code, as the subject has been fully dealt with in Sections 32 and 33, Act I of 1872 (the Evidence Act, under

the heading "Statements by persons who cannot be called as witnesses"). The provisions, also, as to dying declarations have been omitted from the present Act, and find a place in Section 32 of the Evidence Act.

Magistrates should be required to record the evidence of the Medical Officer before committing to the Court of Session any case regarding an offence affecting the human body, for the omission to record this evidence might very possibly lead to the acquittal of an accused person at the Session Court, if the medical officer's attendance could not be procured before that Court (C. H. Ct., 42 of 1865).

The High Court of Calcutta, in their Circular No. 11 of 2nd September, 1867, have laid down rules regarding the examination of the accused person, also the examination of medical witness, and the examination of other witnesses, and ordering such examinations when so received to be detached from the proceeding in the preliminary inquiry, and *annexed to the record of the trial*.

The *report* of a Medical Officer, it must be remembered, is no legal evidence; his statement to be evidence must have been taken on oath. The Medical Officer's evidence should be put in and read before the accused is put on his defence. A duly attested record of the Medical Officer's statement on oath is *prima facie* proof of such evidence before the Court of Session, and it is not necessary to summon him to the Court of Session.

324. If an accused person admits the commission of an offence, before a Court competent to try him for such offence, such Court *may convict him on his own admission*.

Accused may be convicted on his own plea.

May convict him, not shall convict him, on his own admission.—To make it compulsory for the Court to commit him on his own admission would have been to give an accused the power of admitting the commission of a lesser offence, *e.g.*, culpable homicide, not amounting to murder, where the offence charged was murder, whereas a continuation of the trial, notwithstanding the admission of the accused, might elicit facts proving circumstances not admitted.

Section 30, Act I of 1872, deals with confessions affecting others, by one being tried jointly for the same offence. It is there laid down, that "when more persons than one are being tried *jointly for the same offence*, and a confession made by one of such persons, affecting himself and some other of such persons, is proved, the Court may take into consideration such confession as against such other person, as well as against the person who makes the confession." This is different to the English law on this point, and, as far as reason goes, appears to be an improvement on the old rule, that one man's confession cannot be evidence against his companion, for it is unreasonable to expect a Court or jury to hear a confession given in evidence against one which affects the other prisoner, and not to have their minds influenced by that confession with regard to both prisoners.

(370) 325. Any document purporting to be a report from the Chemical Examiner or *Assistant Chemical Examiner* to Government, upon any matter or thing duly submitted to him for examination or analysis and report, in the course of any criminal trial, or in any preliminary inquiry relating thereto, *may*, if it bear his signature, be used as evidence in any criminal trial.

Report of Chemical Examiner.

The words given in italics have been added to this section by the present Act X of

1872; and, further, it has been left optional to the Court to use the report (herein referred to) as evidence: the old law had it, "shall be received in evidence."

The document put in must purport to be the original report, and not a *copy* of the report (15 W. R., 122).

The Court may presume that the signature of any such document is genuine, and that the person signing it held the office which he professed to hold at the time when he signed it.

Genuineness of signature may be presumed.

A Report.—If the report referred to in this section is put in as evidence by the prosecution, it should be read before the prisoner is called upon for his defence (Cir. C. H. C., No. 11 of 2nd September, 1867). It must be borne in mind that the original report of the Chemical Examiner bearing his signature should be put in evidence; a copy of such report is not evidence under this section (*R. v. Bishumbur Doss*, 15 W. R., 50).

326. Where a previous conviction or acquittal is to be proved against an accused person, application shall be made to the officer in whose custody the records of such trial may be. It shall not be necessary to produce the record of the conviction or acquittal of such accused person, or a copy thereof, but an extract may be produced in proof of such conviction or acquittal, if certified under the hand of the Clerk of the Court, or other officer having the custody of the records of the Court in which such conviction or acquittal was had, or by the deputy of such Clerk or officer, to be a copy of the charge, finding, and sentence, as the case may be.

Previous conviction or acquittal how proved.

Section 54, Act I of 1872, provides, that in criminal proceedings the fact that the accused has been previously convicted may be proved. In England, this is done with respect to receivers of stolen property only: it might with advantage be extended to other cases. This Section 326 lays down the procedure as to how a previous conviction or acquittal is to be proved. It will be safer to have a personal identification of the accused as well; and, as a rule, there can be little difficulty in getting such personal identification. For instance, one of the Amlah of the Court in which the former case was tried, or the prosecutor, or one of the witnesses in the former case, or the policeman who arrested him.

327. If an accused person abscond, and after due pursuit cannot be arrested, any Court competent to try or to commit such accused person for trial for the offence complained of may, in his absence, record the statements of the persons acquainted with the facts, and such depositions may, on the arrest of such person, be put in on his trial for such offence, if it is not practicable to procure the attendance of

Record of evidence in the absence of the accused.

such witnesses. (*Vide* note quoting Oudh Judicial Rules under Section 171, *ante*.)

In this section it is provided, that in the case of accused persons who abscond, any competent Court may record the statements of persons acquainted with the facts of the case, and that such statements shall subsequently be available for the purposes of the trial.

328. Whenever any Magistrate, after having heard part of the evidence in a case, ceases to exercise jurisdiction in such case, and is succeeded by another Magistrate who has and who exercises jurisdiction in such case, such Magistrate last named *may decide* the case on the evidence partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and commence afresh :

Provided that the accused person may, when the second Magistrate commences his proceedings, demand that the witnesses shall be re-summoned and re-heard, in which case the trial shall be commenced afresh.

Provided also that any Court of Appeal or Revision, before which the case may be brought,

Or, in cases tried by Magistrates subordinate to the Magistrate of the District, the Magistrate of the District, without appeal,

May set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was had, if such Court or Magistrate shall be of opinion that the accused person has been materially prejudiced thereby, and may order a new trial.

This section provides, that in cases where, without objection on the part of the accused, evidence has been taken partly by one Magistrate and partly by another, the conviction may, if the accused person has not been prejudiced, be upheld.

329. Whenever from any cause any Magistrate making an inquiry, under Chapter XV of this Act, is unable to complete the proceedings himself, any other Magistrate having jurisdiction to inquire and to commit, may complete the case and proceed as if he had recorded all the evidence himself.

Commitments made, therefore, on evidence partly recorded by one officer and partly by another, are in every case sustainable by the provisions of this section.

330. Whenever it appears that the attendance of a witness cannot be procured without an amount of delay, expense, or inconvenience, which under the circumstances of the case would be unreasonable, it shall be competent to a Court of Session or to a High Court to dispense with the personal attendance of such witness.

Such Court of Session or High Court may direct a commission to the Magistrate of the District, or to a Magistrate of the first class, in whose jurisdiction such witness may be. The Magistrate to whom the commission is directed shall proceed to the place where such witness is, or shall summon such witness before himself. Such Magistrate shall take the evidence of such witness in the same manner, and shall have for this purpose, and may exercise, the same powers as in trials of warrant cases. (*Vide* the provisions of Section 33, Act I of 1872, as to the relevancy of evidence so taken.)

The prosecutor and the accused person may forward interrogatories to which the officer to whom the commission is directed shall cause a return to be made, or the prosecutor may appear personally before the Magistrate to whom the commission is directed, or the prosecutor or accused person may so appear by authorized agent.

Whenever, in the course of a trial before a Magistrate, it shall appear that a commission ought to be issued for the examination of a witness whose evidence is necessary in such trial, such Magistrate shall apply to the Court of Session, to which he is subordinate, stating the reasons for the application; and such Court may either issue a commission in the manner hereinbefore provided, or may reject the application.

Amendment 35 of 1874.—After the second paragraph of Section 330, the following shall be inserted (namely):—

“ If the witness is within the local limits of the ordinary original criminal jurisdiction of any of the High Courts of Judicature at Fort William, Madras, and Bombay, the

Court dispensing with his personal attendance may direct a commission to any Police Magistrate within such limits, and such Police Magistrate shall have the like power to compel the attendance and examination of witnesses as he possesses for that purpose in cases pending before him."

And in the third paragraph of the same section, for the words "to which," the words "upon which" shall be substituted; and for the words "cause a return to be made," the words "shall examine the witness" shall be substituted, and after the word "Magistrate," the words "or Police Magistrate" shall be inserted.

And after the fourth paragraph of the same section, the following paragraph shall be inserted (namely):—

"After any commission issued under this section has been duly executed, it shall be returned, together with the deposition of the witness examined thereunder, to the Court out of which it issued; and the commission, the return thereto, and the deposition of such witness may be used as evidence in the case and shall form part of the record."

CHAPTER XXV.

EVIDENCE HOW TAKEN.

This chapter deals with the mode in which evidence is to be taken. It is to be observed, that from "trials" there are first excepted "summary trials," and in respect of these a distinct procedure, including provisions as to evidence, has been provided by Chapter XVIII, *ante*. Then again, after this exception, "trials" have been subdivided into "summons cases" under Section 333, and "other trials," which are included with inquiries in the words "all other cases," in Section 334.

(43) 331. In all Criminal Courts, complainants and witnesses shall be examined *upon oath or affirmation*, or otherwise, according to the provisions of the law for the time being in force, in relation to the examination of witnesses.

Upon oath or affirmation.—In India, in its present stage, there is, undoubtedly, a special sanction attaching to oaths; but there is not in India, as in England and other western countries far advanced in civilization, any social sanction to tell the truth. As a rule, natives ascribe far more importance to superstitious ceremonies, and oaths based thereon, than to the correct discharge of social duties. Truth is not respected by the masses as a public duty; to lie in Court in a friend's favour is not looked upon as any great sin; to tell the truth against one's own interest is not regarded as a virtue, independently of an oath. But there is no country in the world where an oath administered according to the forms, practice, and ideas of the natives is more effective than in India. The terror of being punished by law for telling a lie does not exist, so it is no use trusting to that as a deterrent. The chance of a successful prosecution for perjury, pure and simple, is almost *nil*. There is a much greater chance of a man being punished for *contradicting* himself, than for committing downright perjury.

“While rulings do his brain confuse,
And judges all take different views.”

(*Vide* notes on this point under Section 193, Indian Penal Code, and Section 209, C. C. P., *ante*.)

Act X of 1873 contains the law relating to oaths. The object of this Act is (1) to consolidate the law relating to judicial oaths and affirmations, and (2) to repeal the laws requiring declarations to be made by Judges, Magistrates, Munsiffs, &c., before entering on their official duties. It does not apply to proceedings before Courts-martial, or to oaths prescribed by the laws which the Governor-General has the power to repeal; and it removes the doubt which was raised as to the power of Courts in certain parts of India to administer oaths and affirmations.

332. In inquiries and trials (other than summary trials) under this Act the evidence of the witnesses shall be recorded by the Magistrate or Sessions Judge, as the case may be, in the following manner:—

(267) 333. In summons cases tried before Magistrates, and in cases of the kind referred to in Section 222, when tried by a Magistrate of the first or second class, otherwise than at a summary trial, the Magistrate shall

Examination of complainants and witnesses.
In summons cases and in trials by first and second-class Magistrates of certain offences.

make a memorandum of the substance of the evidence of each witness, as the examination of the witness proceeds.

Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record.

If the Magistrate is prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and shall cause such memorandum to be made in writing from his dictation in open Court, and shall sign the same, and such memorandum shall form part of the record.

Under the provisions of this section, the Magistrates of the first and second class are relieved from taking full evidence, reading it over to the witnesses, &c., in all cases of petty theft, house-trespass, rioting, mischief, &c., and are only required to keep in all these, as well as in all summons cases, a mere memorandum or note of the *substance* of the evidence as it proceeds,—a procedure far less tedious than that required by the old law.

(195) 334. In all other cases before Magistrates, and in all proceedings before Courts of Session, the evidence of *each witness* shall be taken down in writing in the language in ordinary use in the district in which the Court is held, by or in the presence and hearing, and under the personal direction and superintendence of the Magistrate or Sessions Judge, and shall be signed by the Magistrate or Sessions Judge.

When the evidence of a witness is given in English, the Magistrate or Sessions Judge may take it down in that language with his own hand, and an authenticated translation of the same, in the language in ordinary use in the district in which the Court is held, shall form part of the record.

If the accused person be a European British subject, or be familiar with the English language, no translation shall be necessary.

In cases in which the evidence is not taken down in writing by the Magistrate or Sessions Judge, he shall, as the examination of each witness proceeds, make a memorandum of the substance of what such witness deposes, and such

In all other cases before Magistrates, and in all proceedings before Courts of Session.

Evidence in English.

Memorandum when evidence not taken down in writing.

memorandum shall be written *and signed* by the Magistrate or Sessions Judge, with his own hand, and shall form part of the record.

If the Magistrate or Sessions Judge is prevented from making a memorandum as above required, he shall record the reason of his inability to do so.

Each witness.—This term witness includes a complainant in a case.

And signed.—In the event of a witness being dead, or his attendance not procurable at the Court of Sessions, his deposition before the Magistrate would not be admissible in evidence unless it had been signed by that officer. An attestation by initials *only* is insufficient. The evidence of the witness should be conducted in the presence of the accused. To read to the accused the deposition of a witness on a former trial is not an examination of such witness. Such witness must be examined afresh, and the accused must be given the power of cross-examining him.

(196) 335. The Local Government may direct that in any district or part of a district, or in proceedings before any Court of Session, or before any Magistrate or class of Magistrates, the evidence of complainants or witnesses *shall be taken down by the Magistrate or Sessions Judge with his own hand in the vernacular language of the Magistrate or Sessions Judge*, unless the Magistrate or Sessions Judge be prevented by any sufficient reason from taking down the evidence of any complainant or witness, in which case he shall record the reason of his inability to do so, and shall cause the evidence to be taken down in writing from his dictation in open Court.

The evidence so taken down shall be signed by the Magistrate or Sessions Judge, and shall form part of the record :

Provided that, if the vernacular language of the Magistrate or Sessions Judge be not English, or the language in ordinary use in the district in which the Court is held, the Local Government may direct him to take down the evidence in the English language, or in the language in ordinary use in the district in which the Court is held, instead of his own vernacular.

The words "or in proceedings before any Court of Session, or before any Magistrate or class of Magistrates," have been added to this section

by the present enactment; and, further, the provisions of this section have been extended to the evidence of *complainants*, as well as witnesses.

"The evidence of witnesses shall be taken down by the Magistrate with his own hand, and in his own vernacular."—Examination of the accused to be recorded in the language in which it is delivered, as well as in the language of the officer trying the case.

The Calcutta High Court, in their Cir. No. 9 of 1865, issued the following instructions regarding the taking down of evidence by the Magistrate. In depositions in which there may be any doubt as to the exact meaning of any expression used, and in which the doubtful expression has an important bearing on the offence of which a prisoner is charged, the Calcutta High Court suggested the expediency of transcribing in Roman characters the words actually used, in order that the Court may be in a position, on the matter coming before it, without fear of error, to determine on their exact signification, and, in consequence, to give them their due and proper weight.

In many instances the Local Governments might allow the Magistrate or Sessions Judge to keep only a memorandum of the evidence in his own handwriting, and let his Sheristadar or Court Mohurir keep a full vernacular record of the evidence as it is given. To ask a man to take down the evidence himself verbatim of witness after witness in a long case, and to, at the same time, conduct the case efficiently, is to ask him to do an impossibility. Every page of matter that the Judge has to write bending over his desk, takes so much out of him, and totally incapacitates him, mind and body, from giving himself wholly to the efficient conduct of the case, as he otherwise could, were the record to be in the vernacular, and he to keep notes himself. Such a laborious and fatiguing procedure is not required in any other part of the world. If such a record as Magistrates and Judges are now required to keep is *really necessary* for the purposes of justice (which I doubt), it is one that takes from the efficient conduct of the case to add to the voluminousness of the record, and, to my mind, to the deterioration of work.

(268) 336. In cases of the kind referred to in Section 333, tried before Magistrates, the Magistrate may, if he thinks fit, take down the evidence of any witness in the manner provided in Section 334, or, if within the jurisdiction of such Magistrate, the Local Government has made the order referred to in Section 335, in the manner provided in Section 335.

(197) 337. The Local Government may determine what, for the purposes of this Act, shall be held to be the language in ordinary use in any district in which a Court is held.

Local Government to decide what language is to be held to be in ordinary use.

(198) 338. The evidence taken under Section 334 shall

Form of record of evidence. not ordinarily be taken down in the form of question and answer, but in the form of a narrative.

It shall be in the discretion of the Magistrate or Sessions Judge to take down, or cause to be taken down, any particular question and answer, if there appear any special reason for so doing, or any person, who is a prosecutor or a person accused, or his counsel or agent, requires it.

(198) 339. As the evidence of each witness, taken under Procedure in regard to evidence when completed. Section 334, is completed, it shall be read over to the witness in the presence of the accused person if in attendance, or of his agent when his personal attendance is dispensed with and he appears by agent, and shall, if necessary, be corrected.

If the witness deny the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary.

If the evidence be taken down in a language different from that in which it has been given, and the witness does not understand the language in which it is taken down, the witness may require his evidence as taken down to be interpreted to him in the language in which it was given, or in a language which he understands.

(200) 340. In all cases whatever, when the evidence is given in a language not understood by the accused person, it shall be interpreted to him in open Court in a language understood by him, where he is present in person.

If he appears by agent, and the evidence is given in a language other than the language in ordinary use in the district in which the Court is held, it shall be interpreted to such agent in that language.

In cases in which documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.

This section relates only to the oral evidence of witnesses. As to documentary evidence, although a prisoner has a right to have all or any part of any document used on his trial translated or interpreted to him ; yet,

where a document is put in for the purpose of merely giving formal proof of that which is an incontestable fact, it is not necessary to interpret it at length. It would be sufficient if the prisoner was made to understand what the document was, and for what purpose used (15 W. R., 25).

(249, 267, 307) 341. Every Sessions Judge or Magistrate recording the evidence of a witness shall record such remarks as he thinks *material respecting the demeanour* of such witness whilst under examination.

Remarks respecting demeanour of witness.

This section contains concisely the provisions of the old Sections 267, 299, and 307, C. C. P. The original Section 249 of Act XXV of 1861 was altered by Act VIII of 1869, and the language shortened by making reference to particular sections, instead of referring, as the original section did, to Chapter XII, *generally*, and there relating at full the provisions referred to.

Material respecting demeanour—former conviction.—A question of some importance, is the credibility to be attached to the evidence of a witness, himself taxed with previous convictions ; for counsel not unfrequently urge such a fact as a reason for disbelieving the witness on that account. If the witness has, since his previous conviction, been leading a respectable life, and earning an honest livelihood, there can be no reason, on the score of previous conviction, for disbelieving his testimony ; for if such testimony is to be put on one side, as of no avail, the efforts of those who try to reclaim persons from a life of crime are thrown away. Moreover, a person who, having fallen into crime, is reclaimed and leads an honest life, has given a guarantee to society that he is in earnest, and that for that very reason he would be more careful to do nothing which would imperil his position.

OF THE EXAMINATION OF PERSONS ACCUSED.

(202, 249, 373) 342. In all inquiries and trials a Criminal Court may from time to time, and at any stage of the proceedings,

Accused may be questioned.

Put any questions to the accused person which such Court may think proper.

Vide notes under Section 250, *ante*; also under Section 193, *ante*. There is no provision here for previously warning the accused before questioning him.

Articles 167 and 168 of the *Strafprozessordnung* prescribe, that when the accused is examined for the first time, the Judge shall admonish him to say only the truth. The Judge must communicate to the accused all the facts that render him suspected. Further, Article 171 of the *Strafprozessordnung* forbids the "*Untersuchungsrichter*" having recourse to any

promise, deceit, threat, or bodily force with the object of inducing the accused to confession or other depositions, even if the accused refuses to answer, or feigns illness, madness, dumbness, deafness, or weak understanding.

343. The accused person shall not be liable to any punishment for refusing to answer, *or for answering falsely*, questions asked under Section 342, but the Court shall draw such inferences as seem just from such refusal.

Accused not punishable for refusal to answer.

False responson is a criminative fact infinitely stronger than non-responson, but even such conduct has its infirmative circumstances, for, as innocent persons have been found, under the influence of fear, &c., to resort to *false evidence* in their defence, false statements may arise from similar causes. (*Vide* notes under Section 250, *ante*; also under Section 361, *post*, and 344, *post*, on confessions as criminal evidence.)

(203) 344. *Except as is provided in Section 347*, no influence by means of any promise or threat, or otherwise, shall be used to the accused person to induce him to disclose or withhold any matter within his knowledge.

No influence to be used to induce disclosures.

Under English law, a confession of his guilt by the accused is in general sufficient to support a conviction. But this is only on the supposition that it is freely and voluntarily made; it is in no case evidence except against himself. It is also a rule, that if any part of a confession is used to establish the case on the part of the prosecution, the whole of it must be given in evidence, though the jury are at liberty to believe those parts which make against the accused, and to disbelieve what he alleges in his favour (Steph. Com. vol. iv, c. xxii, p. 519).

The subject of confessions is dealt with in the Evidence Act, I of 1872, Sections 24—28. The provisions of these sections are reprinted under Section 120, *ante*. Section 24, Act I of 1872, enacts a well-known rule of English law, but Sections 25 and 26 carry this provision further than the rule which obtains in England. They provide a security for the accused not provided by the law of England, but as much needed there as in India. Policemen, perhaps, may not intend to wrong men whom they have in their custody, but it must never be forgotten that it is for their personal advantage that they should discover crime; and if this can only be done by means of the confessions of their prisoners, there is a very strong temptation held out to them to invent confessions where they never were made. That such a temptation exists is good ground for saying that such confessions should not be evidence.

An admission of crime, when fairly made after warning, is legally admissible: it is not necessary that a formal accusation shall have been made against the person to render his confession valid (5 R. J. P. J., 151). The confession of a prisoner before a Magistrate, though retracted

before the Judge, is admissible in evidence against the prisoner, provided the Judge be satisfied that it was voluntarily made (Cr. R., 6 W. R., 81). The words, "except as provided in Section 347," were added to the original Section 203, Act XXV, 1861. The object of this would appear to be to make admissible as evidence against an accused person a statement previously made by the same person when he was examined as a witness under a promise of pardon. To do so would have been contrary to the spirit of the old Section 203.

A series of dicta, ranging over two centuries, show it to be well-established law, that when more prisoners than one are on their trial before a jury, the confession of any one can only be evidence against him who makes it, and the jury must dismiss from their minds any consideration of such confession as regards evidence against the others, and not attach any legal value to it whatever. This is a broad principle, which ought to be remembered; remembering, at the same time, not to confuse the *confession* of a prisoner with the sworn testimony of an accomplice who is admitted into the witness-box as a giver of evidence on oath (see 6 M. J., 245). An old Latin jurist, Calphurnius Flaccus (cited in the Talbot case), said, that "even a voluntary confession is to be regarded with suspicion," and Lord Stowell laid it down (*Williams v. Williams*, Consist., 304), that "confession is a species of evidence which, *though not inadmissible, is to be regarded with great distrust*." It is notorious that false self-accusations, arising from general nervous disease, are very far indeed from rare. After the mutiny of the *Hermione* frigate, and the brutal murder of its captain, Captain Pigot, during the war of the great French Revolution, the Government actuary, Mr. Finlaison, stated that he had himself known at least six sailors who volunteered the confession that they had struck the first blow at Captain Pigot, when it was demonstrable that not one of them had ever been in the ship, or had ever seen Captain Pigot in their lives. Yet "they detailed all the horrid circumstances of the mutiny with extreme minuteness and perfect accuracy." "At the Admiralty," says Mr. Finlaison, "we were always able to detect and to establish their innocence, in defiance of their own solemn asseverations."

Or, take another old case, in which there is no mention whatever of *delirium tremens*,—quoted from Heineccius in relation to the great Talbot case to which we have before referred;—"a woman having suddenly died, suspicion of poison attached upon her husband. Having been placed in confinement, he stated he had bought poison from an apothecary in the neighbouring town, mixed it in a cake, and given it to his wife, who shortly after feeling the effects, attempted without success to relieve herself by means of an emetic of melted butter, and expired in great pain about four o'clock the following morning. He added many corroborating circumstances, and amongst others, that having folded up the remainder of the poison, first in paper, and then in a linen cloth, he had buried it under a sod in a neighbouring field. On a more accurate inquiry this account appeared to be false, for no trace of poison was found in the body, nor could it be ascertained that any poison had been sold; and although guided by the self-accuser, nothing could be found deposited as he had described." And this self-accuser accordingly was discharged, though persisting in his confession. Again, take the case of the old Campden murder, "the Campden wonder" as it was called, which took place in 1660.

A man of the name of Harrison, living at Campden, in Gloucestershire, having gone to a neighbouring village to collect some money, disappeared. His servant, a man of the name of Perry, was sent to look after him. Neither returned that night. Next morning Mr. Harrison's son went himself, and met Perry returning. Circumstances were discovered suggesting foul play, and Perry was taken into custody, at first stoutly maintaining his innocence. "But after some days he desired to unburden his conscience to a magistrate, and he then gave a most minute and detailed account of the murder of his master by himself, his mother, and his brother. The readiness with which his delusion adapted itself to circumstances as they arose, and were thrown into his narrative, is marvellous. Thus it happened that the brother, Richard Perry, accidentally drew out of his pocket a cord with a noose, and upon its being shown to John Perry, and his being asked if he knew it, he shook his head, and said, "Yea to his sorrow, for that was the string his brother strangled his master with." And upon this confession, coupled with other circumstances of suspicion, at all events not weaker than those attaching to the Brompton case, the three Perrys were executed. Two years later Mr. Harrison returned to Campden alive and well, giving a romantic and rather unlikely account of the real cause of his absence, for which he may have had his own reasons. See the article headed "Confessions as Criminal Evidence," *in re R. v. Claude Scott Wooley*, who voluntarily gave himself up for the murder of Samuel Lea, the Brompton potman, commonly known as "Old Jack" (*Spectator*, June 17th, 1871).

Accused not to be sworn. (204) 345. No oath or affirmation shall be administered to the accused person.

(205) 346. Whenever an accused person is examined, the whole of such examination, including every question put to him, and every answer given by him, shall be recorded in full, and shall be shown or read to him, and he shall be at liberty to explain or add to his answers.

Examination of accused how recorded.

When the whole is made conformable to what he declares is the truth, the examination shall be attested by the signature of the Magistrate or Sessions Judge, who shall certify under his own hand that it was taken in his presence and in his hearing, and contains accurately the whole of the statement made by the accused person.

In cases in which the examination of the accused person is not recorded by the Magistrate or Sessions Judge himself, he shall be bound, as the examination proceeds, to make a memorandum thereof in the vernacular of the district, or in English, if he is sufficiently acquainted with that language; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own

hand, and shall be annexed to the record. If the Magistrate or Sessions Judge is precluded from making a memorandum as above required, he shall record the reason of his inability to do so.

The accused person shall sign or attest by his mark such record.

If the examination be taken in the course of a preliminary inquiry, and the Court of Session find that the provisions of this section have not been fully complied with, it shall take evidence that the prisoner duly made the statement recorded: Provided that if the error does not prejudice the prisoner, it shall not be deemed to affect the admissibility of the statement so recorded.

The provisions contained in the last two paragraphs of this section have been added by the present enactment.

The material difference between *the examination* of an accused person and *the defence* of the accused should ever be borne in mind. By this section the whole of the examination of an accused person, including every question put to him and every answer given by him, must be recorded in full, and if the provisions of this section are not complied with, the Court of Session in cases coming before that Court will be obliged to take evidence that the prisoner duly made the statements recorded. Further, the examination of an accused person may take place at different times and at any stage of the proceedings (Section 342). The examination of an accused person should always be recorded on one or more sheets of paper separate from the general record of the evidence. The questions to be put to the accused must be such as refer to some particular point in the evidence for the prosecution, to which a distinct reply can be given. A general question, such as "What have you got to say?" is inadmissible in an examination of an accused person. Such a question practically calls on the accused to make a statement in his defence. The object of an examination is not to elicit the defence which the accused may wish to make, but to obtain his version of the facts as spoken to by the witnesses against him.

The language in the final clause of this section does not include confessions under Section 122, *ante*; for the examination here spoken of is an "examination," that is, inquiries as are the subject of Chapters XIV and XV of this Code. It is the examination taken during such inquiry by the Magistrate under Section 193, and rendered admissible in evidence by Section 248. The power to take evidence *aliunde* of the examination of the accused when the record of it is irregular is by this section entrusted to the Court of Session only; this is worthy of notice. See note under Section 122, *ante*.

(209) 347. The Magistrate of the District, any Magistrate of the first class inquiring into the case, *or, with the sanction of the Magistrate of the District, any Magistrate duly empowered to commit to the Court of Session, may*, after recording his reason for so doing, *tender a pardon to any one or more of the persons supposed to have been directly or indirectly concerned in or privy to any offence* specified in column seven of the fourth schedule hereto annexed as

Magistrate may tender pardon to accomplice.

triable exclusively by the Court of Session, on condition of his or their making a full, true, and fair disclosure of the whole of the circumstances within his or their knowledge relative to the crime committed, and every other person concerned in the perpetration thereof.

Any person accepting a tender of pardon under this section shall be examined as a witness in the case under the rules applicable to the examination of witnesses.

Such person, if not on bail, shall be detained in custody pending the termination of the trial.

A Magistrate, having tendered a pardon under this section and examined the accused person, is precluded from trying the case himself.

The present section alters the law somewhat from what it was in Section 209 of the old Code. The portion of this section given in italics shows that any Magistrate of a lower grade than a Magistrate of the first class cannot tender a pardon without the sanction of the Magistrate of the District; and further, a Magistrate of the District can only give this sanction to a subordinate Magistrate who has been already empowered to commit to the Court of Session, and pardon can be tendered only to persons concerned in or privy to offences triable exclusively by the Court of Session.

It has been usual for the Justices of the Peace by whom persons charged with felony are committed to gaol—in cases where it happened that the evidence would otherwise be insufficient to obtain a conviction—to hold out a hope to one of the accomplices that if he will fairly disclose the whole truth as a witness on the trial, and bring the offenders to justice, he should himself escape punishment. Such an accomplice is said to be admitted to become *Queen's evidence*; but his admission in that capacity requires the subsequent sanction of the judges of gaol delivery (*Reg. v. Rudd*, *Cowp.* 331). Nor will a person in general be admitted as *Queen's evidence* if it appear that he is charged with any other felony than that in question (2 C. and P., 411; see *Reg. v. Lea*, R. and R. C. C. R., 361; *Reg. v. Brunton*, *id.* 454). The testimony of an accomplice is in all cases, indeed, regarded with just suspicion; and unless this statement be corroborated in some material part by unimpeachable evidence, the jury are usually advised by the Judge to acquit the prisoner notwithstanding (1 Phil. E. 9th ed., 31; *Tay. E.* 2nd ed., 779). Moreover, if a felon, after having confessed the crime, and being admitted as *Queen's evidence*, fails in the condition on which he was so received, and refuses to give the jury, on the trial of his accomplice, such fair and full information as shall be in his knowledge, he is then himself liable to be tried for the offence, and may be convicted on his own confession (1 Phil. E., 29; *Steph. Com.*, vol. iv, pp. 478 to 485).

Section 133, Act I of 1872 (the Evidence Act) lays it down that "an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorrobo-

rated testimony of an accomplice." See also Section 30, Act I of 1872, as to the effect of anything said by one prisoner in his confession as against a fellow-prisoner.

If any person to whom a tender of conditional pardon is made upon certain conditions, does not act up to those conditions, the offer is null and void, and he may be committed for trial. If failure to fulfil the conditions occurs after the offer of pardon has been accepted, and the person examined as a witness, the Court of Session can order his commitment; but if the failure is before the case goes out of the Magistrate's hands, that officer is himself competent to deal with the matter (1 R. J. P. J., 236).

It was held by the Bombay High Court (in Reg. v. Babau, Bala, and Jote) that the English practice should be followed as to the amount of corroboration required to support the evidence of an accomplice, which is that when he speaks as to two or more persons having been concerned in the same offence, his testimony should be confirmed, not only as to the circumstances of the case, but also to the identity of the prisoners; and that any prisoner as to whom his testimony is not supported should be acquitted (3 Bom. H. C. R., 57).

And on this point (in 11 W. R., 21) Norman, J. said,—The true rule on the subject of corroboration of the evidence of approvers is, that if the Court is satisfied that the witness is speaking the truth in some *material* part of his testimony, in which it is seen that he is confirmed by unimpeachable evidence, there may be just ground for believing that he also speaks truth in other parts as to which there may be no confirmation.

The effect of a pardon is not to render competent a witness otherwise incompetent, because the conviction of crime does not now disqualify. Its only effect is to protect from prosecution a witness who, in accordance with the conditions, fully and fairly discloses the matter. An accused person is an admissible witness, although he may have not received a pardon (H. C. Madras Pro., 1865).

A Police Officer invested with magisterial powers under Act V of 1861, cannot tender a pardon under this section, nor can a Magistrate authorize him to do so (6 W. R., 5).

(210) 348. The High Court, as a Court of Revision, and the Court of Session, after committal, but before the commencement of a trial, may, with the view of obtaining on the trial the evidence of any person or persons supposed to have been directly or indirectly concerned in or privy to any such offence, instruct the Magistrate to tender a pardon on the same condition to such person or persons.

The Court of Session in like manner and on the same condition may, at any time *before judgment is passed*, with the view of obtaining on the trial the evidence of any person or persons supposed to have been directly or indirectly

High Court or Court
of Session may direct
tender of pardon.

concerned in or privy to any such offence, tender a pardon to such person or persons.

Under Act XXV of 1861, tender of pardon could not be offered before the commencement of a trial; this was altered, and such power granted by Act VIII of 1869. The present enactment, X of 1872, has added the words "*before judgment is passed*," so that it is now plain up to what time a pardon can be offered by the Court of Session.

Again, the old Section 210 ran, "The High Court, as a Court of Reference in cases tried with the aid of assessors;" whereas the present section, the High Court, *as a Court of Revision*, may instruct the Magistrate to tender a pardon. A trial before a Court of Session is considered concluded after the defence and evidence in support of defence has been recorded (8 W. R., 13).

(211) 349. When a pardon has been tendered under Section 347, or Section 348, if it appear to the Magistrate before *the trial*, or to the Court of Session *before judgment has been passed*, or to the High Court as a Court of Reference or Revision, that any person who has accepted such offer of pardon has not conformed to the conditions under which the pardon was tendered, either by wilfully concealing anything essential, or by giving false evidence, such Magistrate or Court *may commit, or direct the commitment*, of such person for trial for the offence in respect of which the pardon was so tendered.

The statement made by a person under pardon, which pardon has been withdrawn under this section, may be put in evidence against him.

This section contains provisions somewhat similar to Section 211, Act XXV of 1861, as amended by Section 4, Act VIII of 1869. Under the Section 211, XXV of 1861, no power was given to a Magistrate to commit a person who had been offered a pardon but failed to comply with the conditions under which it was offered. The amended section provided for this, and the present section has substituted the words "*the trial*" for "*the committal*," and has added the words "*before judgment has been passed*" and "*or revision*" after "of reference;" and further, the last paragraph of this section is an addition to the Code.

Where a person to whom a tender of conditional pardon has been extended is considered by the S. J. not to have conformed to the conditions under which pardon was tendered, the S. J., in exercising the power given him by this section, ought not to try him along with prisoners in whose case he has already given testimony (*Queen v. Petumber Dhoter*, 14 W. R., 10).

May commit or direct commitment.—Previously, the Court of Sessions in revoking a tender of pardon could only direct the commitment of the offender (4 W. R., 4). Now the Court can commit itself or direct the commitment of the offender.

A person accused of an offence was offered a pardon, the conditions of which he accepted, and made a statement; he afterwards retracted his statement. *Held*, that the statement could not be used against the prisoner (5 N. W. P. H. C. R., 217).

CHAPTER XXVI.

OF SECURING THE ATTENDANCE OF WITNESSES.

Sections 350 to 356 are general, and apply to every case; Sections 357 to 367 to "inquiries," "summons and warrant cases," "sessions trials," and "securing documentary evidence," as specified under each of these headings.

350. The following procedure shall be pursued in order to obtain the attendance of witnesses before a Magistrate or Criminal Court.

(262, 367) 351. Any Court or Magistrate may, at any stage of any proceeding, inquiry, or trial, summon, in the manner provided by Chapter XII, any witness, or examine any person in attendance, though not summoned as a witness, and it shall be its or his duty to do so if the evidence of such person appears essential to the just decision of the case.

This section is made up of the provisions of Sections 262 and 367, Act XXV of 1861. Read with the preceding one, the Magistrate has now the power of summoning witnesses in any proceeding, be such proceeding a judicial proceeding or not.

Act XV of 1869 provides facilities for obtaining the evidence, and appearance of prisoners, and for service of process upon them.

(188, 262) 352. If a Court or Magistrate *has reason to believe* that any witness whose attendance is required will not attend to give evidence without being compelled to do so, it or he may, instead of issuing a summons, issue a warrant of arrest in the first instance.

When warrant of arrest may issue in first instance.

Witnesses arrested under a warrant, and brought before a Magistrate, should not be treated as criminals; they should be simply treated as persons arrested on civil process (Calcutta High Court, 1864, Cir. 21).

The Calcutta High Court (Cir. 19, 1864) have ordered that there shall be entered in the examination of complainants and witnesses the name of the person examined, and of his or her father, and if she be a married woman, that of her husband, the religion, caste, profession, and age of the deponent, and the village and the pergunnah in which he or she resides.

Has reason to believe.—A Magistrate has no authority to issue simultaneously a summons and a warrant to a witness under this section, unless he has reason to believe that the witness will not attend in obedience to a summons (12 W. R., 18, R. v. Chunden Seekar).

(189) 353. If such warrant cannot be *executed*, and the Court or Magistrate considers that the witness absconds (22) or conceals himself for the purpose of avoiding the service thereof, it or he may issue a proclamation, requiring the attendance of such witness to give evidence at a time and place to be named therein, to be affixed on some conspicuous part of such witness's ordinary place of abode.

Procedure when warrant cannot be served.

If the witness does not attend at the time and place named in such proclamation, the Court or Magistrate may order the attachment of any movable property belonging to such witness to such amount as seems reasonable, not being in excess of the amount of costs of attachment and of any fine to which the witness may be liable under the provisions of the following section.

Such order shall authorize the attachment of any movable property within the jurisdiction of the Court or Magistrate by whom it was made; and it shall authorize the attachment of any movable property without the jurisdiction of the said Court or Magistrate, when endorsed by the Magistrate of the District in which such property is situated.

Section 171, *ante*, provides the procedure for absconding offenders.

(190) 354. If the witness appears and satisfies such Court or Magistrate that he did not abscond or conceal himself for the purpose of avoiding the *execution* of the warrant, and that he had not notice of the proclamation in time to attend at the time and place named therein, the Court or Magistrate shall direct that the property be released from attachment, and shall make such order in regard to the costs of the attachment as to such Court or Magistrate seems fit.

Release of attached property of witness appearing and satisfying Court or Magistrate.

If such witness does not appear, or, appearing, fails to satisfy the Court or Magistrate that he did not abscond or conceal himself for the purpose of avoiding the execution of the warrant, and that he had not such notice of the proclamation as aforesaid, the Court or Magistrate may order the property attached, or any part thereof, to be sold for the purpose of satisfying all costs incurred in consequence of such attachment, together with the amount of any fine which may be imposed upon such witness under the provisions of Section 172 of the Indian Penal Code.

Sale of property of witness not appearing or not satisfying Court or Magistrate.

If the witness pays to such Court or Magistrate the costs and fine as aforesaid, his property shall be released from attachment.

In this and the preceding section the terms *executed* and *execution* have been substituted for *served* and *service*.

It is competent for any Criminal Court to act under this and the preceding section.

(191) 355. If any person summoned to give evidence neglects or refuses to appear at the time and place appointed by the summons, *and no reasonable excuse is offered* for such neglect or refusal, the Court or Magistrate, *upon proof of the summons having been duly served*, may issue a warrant under his hand and seal, to bring such person before him to testify as aforesaid.

Arrest of person disobeying summons.

And no reasonable excuse is offered.—In order to constitute a lawful excuse for non-attendance, there must be some impossibility, moral or physical, to his attendance (W. R., Cr. L., No. 653, 1865).

Upon proof of the summons, &c.—A Magistrate is not bound to issue a

warrant against a witness unless there is proof that the summons has been duly served (7 W. R., 37).

(192) 356. If any person summoned or brought before a Magistrate *refuses to answer* such questions as are put to him, without offering any *reasonable* excuse for such refusal, such Magistrate may, by warrant under his hand and seal, commit him to custody for any term not exceeding seven days, unless in the meantime such person consents to be examined and to answer, after which, in the event of his persisting in his refusal, he may be dealt with according to the provisions of Sections 435 and 436.

Refuses to answer.—The offence committed by a witness in refusing to answer a question is punishable under Section 179, I. P. C.

In this and the preceding section the term "*reasonable*" has been substituted for the old term "*just*."

INQUIRIES.

(207) 357. In inquiries preliminary to commitment to a Court of Session or High Court, the Magistrate shall procure the attendance of the witnesses for the prosecution as in cases usually tried upon warrant; and it shall be in his discretion to summon any witness offered on behalf of the accused person to answer or disprove the evidence against him. If the Magistrate refuses to summon a witness so offered, he shall record his reasons for such refusal.

The Magistrate may summon and examine supplementary witnesses after commitment and before the commencement of the trial, and bind them over to appear and give evidence. Such examination shall, if possible, be taken in the presence of the accused person, and, in every case, a copy of the examination of such witnesses shall be given him free of cost.

Magistrates are now empowered to summon and examine supplementary witnesses within a certain limited time.

(227) 358. In such inquiries, when the person accused is to be committed for trial and has given in the list of witnesses mentioned in Section 200, the Magistrate shall summon the witnesses to appear before the Court before which the accused person is to be tried.

When accused person is to be committed.

(228) 359. If the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay, or of defeating the ends of justice, he *may require the accused person* to satisfy him that there are reasonable grounds for believing that such witness is material.

Refusal to summon unnecessary witness, unless deposit made.

If the Magistrate be not so satisfied, he shall not be bound to summon the witness, but, *in doubtful cases*, he may summon such witness, if such a sum is deposited with the Magistrate as he thinks necessary to defray the expense of obtaining the attendance of the witness.

In original criminal trials, the expenses of only such witnesses for the defence as the Judge may consider material will be paid by Government. Prisoners on being committed for trial should be warned to this effect (Circular Order, High Court, Agra, No. 2, 1867).

May require the accused person.—This section does not refer to prosecutors, but only to accused persons who are called upon to give lists of the witnesses they may require at the trial (Adv. Genl., June 13, 1863). A Magistrate cannot absolutely refuse to summon any witness named by an accused person, because, when examined before him, the witness appeared to know nothing (3 W. R., 16).

Section 362, *post*, makes this section applicable to warrant cases.

In doubtful cases.—These words have been added by the present enactment, Act X of 1872.

(232) 360. *Prosecutors and witnesses for the prosecution and defence*, whose attendance is necessary before the Court of Session or High Court shall execute before the Magistrate recognizances, in the Form (F) given in the second schedule to this Act, or to the like effect, to be in attendance when called upon at the Court of Session or High Court to prosecute or to give evidence, as the case may be.

Recognizances of prosecutors and witnesses.

If any prosecutor or witness refuses to attend before the Court of Session or High Court, or to execute the recognizance above directed, the Magistrate may detain him in custody until he executes such recognizance, or

Detention in custody in case of refusal to attend or to execute recognizance.

until the time when his attendance at the Court of Session or High Court is required, when the Magistrate shall send him under custody to the Court of Session or the High Court.

Prosecutors and Witnesses, &c.—This section alters the law as it originally stood. Under Act XXV of 1861, this section did not apply to witnesses for the defence.

SUMMONS CASES.

(262, 263) 361. In summons cases the Magistrate may
In summons cases. summon any person who appears to him likely to give material evidence on behalf of the complainant or the accused.

Ordinarily it shall be the duty of the complainant and accused, in non-cognizable cases, to produce their own witnesses.

In such cases *it shall be in the discretion of the Magistrate* to summon any witnesses named by the complainant or the accused, and he may require in such cases a deposit of the expenses of a witness before summoning him.

Ordinarily it is the duty of the complainant and the accused in non-cognizable cases to bring their own witnesses. It is only under the exceptional circumstances referred to in the first paragraph of this section that the Magistrate should use the discretion given him in the last paragraph of this section to summon witnesses through the agency of the Police.

Shall be in the discretion of the Magistrate.—This section leaves it to the Magistrate's discretion to take evidence for the defence or not. This refers to non-cognizable cases.

In the case of an accused summoning no witnesses in his defence, or in summoning false witnesses, the following maxim applicable to the Law of Evidence should be borne in mind:—" *Omnia præsumuntur contra spoliatorem*," if a man, by his own tortious act, withhold the evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted. Where a party has the means in his power of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, to omit to do so furnishes a strong inference against him,—*e.g.*, where a person who has wrongfully converted property will not produce it, it shall be presumed as against him, to be of the best description (B. L. M., p. 903, 4th ed.). The fabrication of evidence is further calculated to raise a presumption against the party who has recourse to such a practice, even stronger than when evidence is suppressed or withheld (B. L. M., p. 906, 4th ed.).

WARRANT CASES.

(186, 253) 362. In warrant cases, the Magistrate shall ascertain from the complainant, or otherwise, the names of any persons who may be acquainted with the facts and circumstances of the case, and who are likely to give evidence for the prosecution, and shall summon such of them to give evidence before him *as he thinks necessary*.

In cases tried upon warrant.

The Magistrate shall also, subject to the provisions of Section 359, summon any witness, and examine any evidence that may be offered in behalf of the accused person, to answer or disprove the evidence against him, and may for that purpose, at his discretion, adjourn the trial from time to time. If the Magistrate refuse to summon a witness named by the accused person, he shall record his reasons for such refusal, and the accused person shall be entitled to appeal to the Court of Session against such refusal.

As he thinks necessary.—Under the provisions of this and the preceding section the Magistrate has now a discretion in regard to the summoning of unnecessary witnesses, and this discretionary power has been most wisely allowed by the Legislature, as it will enable Magistrates to keep cases within reasonable bounds, as well as saving unfortunate witnesses from tramping miles to say they know nothing about the case. This discretion evidently applies only in non-cognizable cases.

SESSIONS TRIALS.

(375) 363. The accused person shall be allowed to examine any witness not previously named by him if such witness be in attendance, but *he shall not* (except as provided in Section 448) *be entitled of right* to have any witness summoned other than the witnesses named in the list delivered to the Magistrate by whom he was committed or held to bail for trial.

Right of accused as to examination and summoning of witness.

He shall not be entitled of right.—The accused can only claim as a right to have those witnesses produced whom he named before the committing officer; but if he produces any other witnesses at the trial, he can have them examined. If all the witnesses summoned for the defence do not appear, and no application be made by the prisoner for their production,

he is held to have waived his right, and trial may proceed without them (W. R. Cr. R., 47 ; see also 3 Cr. R., W. R., 29).

A Session Judge is not bound to record the evidence of witnesses which may appear from the record of the preliminary inquiry before the Magistrate to be irrelevant or hearsay. If the prisoner request examination, proper reason for disallowing it should be recorded (3 W. R., 12).

(365) 364. If a witness before a Court of Session refuses to answer any question which is put to him, and does not offer any just excuse for such refusal, the Court may commit him to custody for such reasonable time as it deems proper, unless in the meantime he consents to be examined and to answer.

Procedure in case of witness refusing to answer.

In the event of such witness persisting in his refusal, he may be dealt with according to the provisions of Section 435 or 436.

OF SECURING DOCUMENTARY EVIDENCE.

365. Whenever an officer in charge of a Police-station or any Court considers that the production of any document is necessary or desirable for the purposes of any investigation or judicial proceeding, such officer or Court may issue a summons to the party in whose keeping such document is believed to be, requiring him to attend and produce such document at the time and place stated in the summons.

Procedure for obtaining production of document required as evidence.

366. If there appears reason to believe that the person to whom the summons is addressed will not produce it as directed in the summons, such officer or Court may issue a search-warrant for the document in the first instance.

When warrant for search for documents may issue.

367. Any Court may, if it thinks fit, impound any document produced before it, or may at the conclusion of the proceedings order such document to be returned to the person who produced it.

Power to impound document produced.

This and the two preceding sections have been added to the C. C. P. by the present Enactment, Act X of 1872, and make necessary provision for securing documentary evidence, and for impounding such documents as the Court thinks fit.

CHAPTER XXVII.

OF SEARCH-WARRANTS.

This chapter contains the provisions of Chapter VIII, Act XXV of 1861.

(114) 368. When a Magistrate considers that the production of anything is essential to the conduct of an inquiry into an offence known or suspected to have been committed, or to the *discovery of the offender*, or *when he considers that such inquiry or discovery will be furthered by the search* or inspection of any house or place, he may grant his search-warrant, and the officer charged with the execution of such warrant may search *or inspect* any house or place within the jurisdiction of the Magistrate of the District.

The Magistrate issuing such warrant may, if he see fit, specify in his warrant the house or place, or part thereof, to which only the search or inspection shall extend, and the officer charged with the execution of such warrant shall then search or inspect only the house, place, or part so specified.

When he considers, &c.—The provisions contained in this section were substituted by Section 4, Act VIII of 1869. Under this section, as it originally stood in Act XXV of 1861, the Magistrate could only grant a search-warrant for the production of a particular thing. He can now grant a search-warrant whenever in his opinion the inquiry into an offence will be furthered by so doing,—*e.g.*, formerly, if a murderer was proved to have been in a house, it could not be searched except there was reason to believe that the knife with which the crime was committed, or the property for the possession of which it was committed, or some other particular thing, was secreted therein. *Now*, the house may be searched on the chance of finding something which may lead to the elucidation of the case. The provisions of this section have also been extended by the addition of the words “*to the discovery of the offender*” and the “*inspection*,” as well as search of any house or place.

369. The last preceding section shall not authorize any

Procedure as to letter in custody of Postal Department. other than the Magistrate of the District to grant a search-warrant for a letter in the custody of the Postal Department;

But if any such letter is wanted for the purpose of any criminal proceeding, any Magistrate or District Superintendent of Police may give notice to the Postal authorities to cause search to be made for and to detain any such letter, pending the orders of the Magistrate of the District, and the Magistrate of the District may, if he think fit, direct the Postal authorities to deliver up any such letter.

This section has been added to the C. C. P. by the present Enactment, Act X of 1872.

(115) 370. A search-warrant shall ordinarily be directed to a Police Officer, but the Magistrate issuing the warrant may, after recording his reasons, if immediate search is necessary and no Police Officer be immediately available, direct it to any other person.

This section contains the provisions of the original Section 115, Act XXV of 1861. The latter section was altered by Section 4, Act VIII of 1869, and has now again been amended. By Act VIII of 1869 amendment, the Magistrate was not *obliged* to issue his warrant through a Police Officer; now he is so obliged to act if a Police Officer be available.

(116) 371. A search-warrant directed or endorsed to a Police Officer may, if he is not able to proceed in person, be executed by any other Police Officer.

In such case the name of such Police Officer *shall be endorsed* upon the warrant by the officer to whom it is directed or endorsed.

Under the old law such warrant was to be directed to a Police Officer in charge of a Police-station.

Shall be endorsed.—The object of endorsement mentioned in the last paragraph of this section is, that the person responsible for due execution may be known.

(117) 372. When it is necessary for a search-warrant to be executed out of the District in which it was issued, any Magistrate within whose local jurisdiction the warrant is to be executed shall endorse his name thereon.

Execution of search-warrant out of jurisdiction of Magistrate issuing it.

Such endorsement shall be sufficient authority for the Police Officer charged with the execution of the warrant to execute the same within the said jurisdiction,

Or the search-warrant may be directed to the Magistrate within whose local jurisdiction the search is to be made, and he shall thereupon endorse his name on such warrant and enforce its execution in the same manner as if it had been issued by himself.

(118) 373. Whenever there is reason to believe that the delay occasioned by obtaining the endorsement of the Magistrate in whose District the warrant is to be executed will prevent the discovery of the thing for which search is to be made, the Police Officer charged with the execution of the warrant may execute the same in any place beyond the district in which it was issued, without the endorsement of the Magistrate in whose local jurisdiction that place is situate.

Search-warrants may in emergency be executed without endorsement.

If the thing for which search is made is found in such place, it shall, when the place where the thing is found *is nearer to the Magistrate having jurisdiction in such place, than to the Magistrate who issued the warrant,* be immediately taken before the Magistrate in whose local jurisdiction it is found, and, unless there be good cause to the contrary, such Magistrate shall make an order authorizing it to be taken to the Magistrate who issued the warrant.

Thing found to be taken to Magistrate within whose jurisdiction it is found.

Order thereon.

If the thing be not found after such search, the Police Officer making the same shall, in addition to the return made to the Magistrate who issued the warrant, report the fact to the Magistrate in whose local jurisdiction the search was made.

The words of this section printed in italics, and also the last paragraph of this section are new, and have been added by the present enactment, Act X of 1872.

(119) 374. If the thing searched for be found within a presidency town, it shall be taken to the Commissioner of Police or to a Police Magistrate, and such Commissioner or

Procedure in such cases within presidency town.

Magistrate shall act in the manner prescribed in Section 373.

(120) 375. Whenever it appears necessary, a Magistrate may, by his warrant, order search to be made in a place out of his jurisdiction, and may direct that the warrant be executed either after or without obtaining the endorsement of the Magistrate within whose jurisdiction the search is to be made.

When a Magistrate issues a warrant under this section, he shall inform the Magistrate within whose local jurisdiction the house or place to be searched is situate, or, if the house or place be situate within a presidency town, he shall inform the Commissioner of Police of the issue of such warrant.

(121) 376. A Magistrate issuing a search-warrant to be executed in any house or place out of the jurisdiction of the Magistrate of the District, or out of his own division, may direct the warrant to any Magistrate within whose local jurisdiction such house or place is situate, and may send the same by post.

On receipt of such warrant by the Magistrate to whom it is directed, he shall endorse his name thereon and enforce its execution in the same manner as if it had been originally issued by himself.

If the warrant is to be executed within a presidency town, it shall be addressed to the Commissioner of Police or to a Police Magistrate.

In such case any property found on search made may be dealt with as provided in Sections 373 and 374.

(127) 377. If the Magistrate of the District or a Magistrate of a division of a District, or a Magistrate of the first class, upon information and after such inquiry as he thinks necessary, has reason to believe that any house or place is used as a place for the deposit or sale of stolen property,

Or for the deposit or sale or manufacture of forged

documents, or counterfeit Government stamps, or counterfeit coin, or instruments or materials for counterfeiting coin or for forging,

Or that any forged documents, or counterfeit stamps, or false seals, or counterfeit coin, or instruments or materials used for counterfeiting coin, or for forging, are kept or deposited in any house or place,

He may by his warrant authorize any Police Officer above the rank of a constable to enter, with such assistance as may be required, and by force if necessary, any such house or place, and to search all such parts of the same as are specified in the warrant, and to seize and take possession of any property, documents, stamps, seals, or coins therein found, which he reasonably suspects to be stolen, forged, false, or counterfeit, and also of any such instruments and materials as aforesaid.

(128) 378. The Magistrate by whom a search-warrant is issued may attend personally for the purpose of seeing that the warrant is duly executed.

Magistrate may attend personally.

The Magistrate may also direct a search to be made in his presence, of any house or place for the search of which he is competent to issue a search-warrant.

Magistrate may direct search in his presence.

(142) 379. Whenever an officer in charge of a Police-station, or a Police Officer making an investigation, considers that the production of anything is necessary to the conduct of an investigation into any offence which he is authorized to investigate, he may search or cause search to be made for the same, in any house or place within the limits of the station of which he is in charge, or to which he is attached.

In such case, the officer in charge of the Police-station, or Police Officer making investigation, shall, if practicable, conduct the search in person.

If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, the officer in charge of the Police-station, or Police Officer making investigation, may require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer *an order in writing*, specifying the

property for which search is to be made, and the house or place to be searched, and such subordinate officer may thereupon search for such property in such house or place.

The provisions of Sections 382 to 385 (both inclusive), relating to search-warrants, shall be applicable to a search made under this section, by or under the direction of an officer in charge of a Police-station, or by a Police Officer *making an investigation*.

Amendment 36 of 1874.—In Section 379 the following words shall be omitted (namely):—

“by or under the direction of an officer in charge of a Police-station, or by a Police officer making an investigation.”

An order in writing.—The process which a Police Officer is competent to issue is not a summons or warrant, but “an order in writing.” (Jud. Com. Punjab, Cir. 8, 21st January, 1862).

Making an investigation.—These words have been added to this section by the present enactment, Act X of 1872.

(143) 380. An officer in charge of a Police-station may require an officer in charge of another Police-station, whether subordinate to the same Magistrate as himself or to a Magistrate of another District, to cause a search to be made in any house or place in any case in which the former officer might cause such search to be made within the limits of his own station.

Such officer on being so required shall proceed according to the provisions of Section 379, and shall forward the thing found, if any, to the officer at whose request the search was made.

(129) 381. An officer *in charge of a Police station* may, without a warrant, enter any shop or premises within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing used or kept therein, whenever he has reason to believe that there are in such shop or premises any weights, measures, or instruments for weighing which are false.

If such officer finds in such shop or premises any weights, measures; or instruments that are false, he may seize the same, and shall forthwith give information of such seizure to the Magistrate having jurisdiction.

When officer of Police-station may require another to issue search-warrant.

Inspection of weights and measures.

In charge of a Police-station.—Act XI of 1870 provided a uniform system of weights and measures throughout British India. Sections 19 to 26 of that Act contain the penalties for infringing the provisions of the said Act. Offences relating to weights and measures are also punishable under Chapter XIII of the Penal Code. Only Police Officers in charge of stations can act under this section, not any Police Officer.

By Section 20, Regulation XII of 1817, the Magistrates in Bombay are bound to keep standards of weights and measures used in retail dealings.

(122) 382. Whenever any house or place liable to search or inspection, under this chapter, is closed, any person residing in or being in charge of such house or place shall, on demand of the officer or other person executing the warrant, allow such officer or other person free ingress thereto, and afford all reasonable facilities for a search therein.

Persons in charge of closed house to allow search.

(123) 383. A Police Officer, or other person authorized by a warrant to search any house or place, may break open any outer or inner door or window of such house or place, in order to execute the warrant, *if, after notification of his authority and purpose and demand of admittance duly made, he cannot otherwise obtain admittance.*

Place to be searched may be broken open.

If after notification, &c.—Under English law, in all cases where the king is a party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the king's process, if otherwise he cannot enter. But before he breaks it he ought to signify the cause of his coming, and to make request to open the doors. (See Semayne's case, 1 Smith's L. Ca., 4th ed., 73.)

(124) 384. If the place ordered to be searched is an apartment in the occupancy of a woman who, according to the customs of the country, does not appear in public, the officer or other person charged with the execution of the warrant shall give notice to such woman in such apartment, not being a woman against whom a warrant of arrest has been issued, that she is at liberty to withdraw.

Breaking of zenana.

After giving such notice and allowing a reasonable time for such woman to withdraw, and affording her every reasonable facility for withdrawing, such officer or person may enter such apartment for the purpose of completing the search, using at the same time every precaution consistent with these provisions for preventing the clandestine removal of property.

(125) 385. Before conducting a search under this chapter, the officer conducting it shall call upon two or more respectable inhabitants of the place in which the house or place to be searched is situate, to attend and witness the search.

Search to be made in presence of witnesses.

The search shall be made in their presence, but they shall not be required to attend the Court of the Magistrate as witnesses, *unless specially summoned by him*.

The occupant of the house or place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search.

Occupant of place searched may attend.

Unless specially summoned by him.—A Magistrate should ordinarily dispense with the attendance of witnesses to a house-search. If their attendance be necessary at the Court of Session, they should be required to attend there, but they should not be subjected to unnecessary harassment (Calcutta High Court, 489, 1865).

(126) 386. Whenever it is necessary for a woman to be searched, the search shall be conducted with strict regard to the habits and customs of the country.

Mode of searching women.

387. Whenever a person is arrested by the Police under a warrant which does not provide for the taking of bail,

Search of arrested persons.

Or under a warrant which provides for the taking of bail, but the arrested person cannot furnish bail,

Or is arrested without warrant, and is not admitted to bail,

It shall be the duty of the arresting officer to search such person, and to place in safe custody all articles other than necessary articles of apparel, found on such person.

A list of such articles shall be forwarded with the daily diary, or with the final report in the case.

This section has been added to the C. C. P. by the present enactment, Act X of 1872, and legalizes the existing practice of searching arrested persons

PART IX.

PROCEDURE INCIDENTAL TO INQUIRY AND TRIAL.

CHAPTER XXVIII.

This chapter contains the provisions of Chapter XII, Act XXV of 1861, and Sections 436, 437, Chapter XXXI of the same Act.

BAIL.

(213) 388. When any person appears or is brought before a Magistrate accused of any bailable offence, *he shall be admitted to bail.*
When bail shall be taken.

He shall be admitted to bail.—To refuse to bail any person bailable is an offence against the liberty of the subject, in any Magistrate, by the common law (Hawk. P. C. 2, c. 15, s. 13) as well as by the Statute of Westminster the first, 3 Edw. I., c. 15, and the Habeas Corpus Act, 31 Car. II., c. 2; see also 56 Geo. III., c. 100.

(212) 389. When any person, accused of any non-bailable offence, appears or is brought before a Magistrate, such person shall not be admitted to bail, if there appear reasonable grounds for believing that he has been guilty of the offence of which he is accused.
Bail not to be taken for certain offences.

If the evidence, given in support of the accusation, is, in the opinion of the Magistrate, not such as to raise a strong presumption of the guilt of the accused person,
When bail may be taken.

Or if such evidence is adduced on behalf of the accused person as, in the opinion of the Magistrate, weakens the presumption of his guilt, but there appears to the Magistrate in either of such cases to be sufficient ground for further inquiry into his guilt,

The accused person shall be admitted to bail pending such inquiry.

Not such as to raise a strong presumption, &c. . . . weakens the presumption of his guilt.—Bail under this section can be demanded only in cases where further inquiry is pending, and the accused has not been discharged (Cr. R., 10 W. R., 34).

Court of Sessions is empowered to admit to bail any person accused of any offence. (*Vide* Section 390, *post.*)

Sufficient ground for further inquiry.—A Magistrate cannot require bail from an accused against whom he finds the evidence is insufficient to prove an offence merely because evidence might hereafter turn up (10 W. R., 34).

(436) 390. The Court of Session may *in any case*, whether there be an appeal *on conviction or not*, direct that an accused person shall be admitted to bail, or that the bail required by a Magistrate be reduced.

Power to direct admission to bail.

In any case.—By this section it is apparent that the Sessions Judge has power to admit the accused to bail in *any* case, whether the offence charged be bailable or not, or can reduce the bail asked for by the Magistrate.

On conviction or not.—This alters the law as it was under Act XXV of 1861, for, under Section 436 of that Act, the words “accused person” did not apply to a party who had been convicted by a Magistrate from whose sentence there was no appeal.

(214) 391. When a Magistrate admits to bail any person accused or suspected of any offence, a *recognizance in such sum of money* as the Magistrate thinks sufficient shall be entered into by the person so accused, and one or more sureties, conditioned that such person shall attend at the time and place mentioned in the recognizance, and shall continue to attend until otherwise directed by the Court, and, if required, shall appear when called upon at the Court of Session or other Court, as the case may be, to answer the charge.

Recognizance of accused and sureties.

A recognizance in such sum of money.—This section simply lays down that the Magistrate is to take a recognizance in a certain sum of money, as he may think sufficient, from the accused, and one or more sureties. Sections 396, 397 lay down the proceedings to be adopted to compel payment of the penalty mentioned in the recognizance from person executing the personal recognizance, and from his sureties. At the same time, however, it is the duty of the Magistrates to satisfy themselves that the sureties are persons of whom it may be reasonably presumed that they can, if necessary, satisfy the terms of the bail-bond.

It may be inferred, that when the Legislature gave the Magistrate power to demand a recognizance with security for the performance of any work, it intended also to give that officer authority to enforce compliance, and to recover the penalty in case of non-compliance. If a party, therefore, after giving a recognizance with security *for the performance of the order* passed by a Magistrate, does not perform that order, the Magistrate should call upon him to show cause why the recognizance should not be escheated, and the amount of the security recovered from the sureties by the attachment and sale of their property; and in case of their failing to show satisfactory cause, the Magistrate should then proceed to attach and sell their property (3 and 4 R. J. P. J., 1864-5).

(215) 392. If through mistake or fraud insufficient bail has been taken, or if the sureties become afterwards insufficient, the accused person may be ordered by the Magistrate to give sufficient bail or to find sufficient sureties, and, in default, may be committed to prison.

Insufficient bail.

(216) 393. If the accused person cannot find sureties when called upon, he shall be admitted to bail upon finding the same at any time afterwards before conviction.

Bail may be taken at any time before conviction.

(217) 394. After the recognizances have been duly entered into, the Magistrate, in case the accused person has appeared voluntarily or is in the custody of some officer, shall thereupon release him; and in case he is in some prison or other place of confinement, shall issue a warrant of release to the jailer or other person having him in his custody, and such jailer or other person shall thereupon release him.

Discharge on bail.

(218) 395. Any one or more of the sureties for an accused person may, at any time, apply to the Magistrate to be discharged from their engagements.

Discharge of sureties.

On such an application being made, the Magistrate shall issue his warrant of arrest, directing that such person be brought before him.

On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the recognizances of the sureties to be discharged, and shall call upon such person to find other sureties, and, in default, may order him to be committed to prison.

(219) 396. Whenever, by reason of default of appearance

Procedure to compel
payment of penalty by
sureties.

of the person executing the personal recognizance, the Magistrate is of opinion that proceedings should be had to compel payment of the penalty mentioned in the recognizance, *he shall proceed to enforce the penalty* by issuing a warrant for the attachment and sale of the movable property belonging to such person, which may be found within the jurisdiction of the Magistrate of the District. Such warrant may be executed within the jurisdiction of the Magistrate of the District, and it shall authorize the distress and sale of any movable property belonging to the accused person without the jurisdiction of the said Magistrate, when endorsed by the Magistrate of the District in which such movable property is situated.

He shall proceed to enforce the penalty.—The difference in the methods of levying amount of recognizance entered into by surety and by accused is, in the former case, the Magistrate can only proceed after calling on surety to show cause why it should not be levied; in the latter case, he can proceed to levy amount *at once* (W. R., Cr. R., p. 4). Before their recognizances are escheated for non-attendance, *a prosecutor or witnesses* should be allowed an opportunity of justifying their default (11 W. R., 36).

(220) 397. Whenever, by reason of default of appearance by the person bailed, the Magistrate is of opinion that proceedings should be had to compel payment of the penalty mentioned in the recognizances of the surety or sureties, *he shall give notice to the surety or sureties to pay the same, or to show cause why* it should not be paid.

If such penalty be not paid, and if no sufficient cause for its non-payment be shown, the Magistrate shall proceed to recover the penalty from such surety or sureties by issuing a warrant for the attachment and sale of any movable property belonging to him or them which may be found within the jurisdiction of the Magistrate of the District. Such warrant may be executed within the jurisdiction of the Magistrate of the District, and it shall authorize the distress and sale of any movable property belonging to the surety or sureties without the jurisdiction of the said Magistrate, when endorsed by the Magistrate of the District in which such movable property is situated.

If such penalty be not paid, and cannot be recovered by such attachment and sale, such surety or sureties shall be liable to confinement, by order of the Magistrate, in the civil jail, during a period not exceeding six months.

He shall give notice, &c.—The notice to pay or show cause must be served on the sureties (9 W. R., 4). Before a warrant can issue attaching the property of a surety, he should be called on under this section to show cause why he should not pay the penalty, and it must appear clearly on the face of the record that he had such notice given him (15 W. R., 82).

(221) 398. The powers given by Sections 396 and 397 may be exercised in every Criminal Court in every case in which a personal recognizance or bail has been given for the appearance of a party or witness, if default is made by the non-appearance of such party or witness before such Court, according to the conditions of such recognizance or bail :

Remission of part of penalty. Provided that the Magistrate or Court may, at his or its discretion, remit any portion of the penalty mentioned in the recognizance of the accused person or of the surety or sureties, and enforce payment in part only :

Revision of orders. All orders passed by any Magistrate, other than the Magistrate of the District, under this section or Section 396 or 397, *shall be appealable to the Magistrate of the District*, or, if not so appealed, may be revised by him.

High Court or Court of Session may direct Magistrate to levy sum forfeited. A High Court or a Court of Session may direct any Magistrate to levy the amount due on a forfeited bail-bond executed in respect of attendance before such High Court or Court of Session.

Amendment 37 of 1874.—In the second paragraph of Section 398, for the words “accused person,” the words “party or witness” shall be substituted.

Shall be appealable, &c.—Orders passed under this section are by the provisions of this section appealable to the Magistrate of the District, as well as subject to revision by him. Under the old law there was no such power of appeal. By Section 34, *ante*, no Magistrate but the Magistrate of the District can revise a bail order.

(437) 399. When any person is required by any officer

or Criminal Court to give bail, except in cases coming under Chapter XXXVIII, such officer or Court may permit such person to deposit a sum of money or Government promissory notes to such amount as it may fix in lieu of such bail.

Deposit may be made instead of bail.

CHAPTER XXIX.

FORMATION OF LISTS OF JURORS AND ASSESSORS AND THEIR ATTENDANCE.

This chapter contains the provisions of Chapter XXIII, Act XXV of 1861, as amended by Act VIII of 1869. By the provisions of this chapter, the Sessions Judge *and* the Collector are to make out the requisite lists, and the Sessions Judge and Collector, or Sessions Judge *and* other officer, are jointly to hear objections, and to disqualify persons from serving as jurors, &c. The *Sessions Judge and Collector* must concur as to their unfitness.

(329) 400. The Sessions Judge and the Collector of the District, or such other officer as the Local Government from time to time appoints in this behalf, shall prepare and make out in alphabetical order a list of persons residing within ten miles from the place where trials before the Court of Session are held, or within such other distance as the Local Government thinks fit to direct, who are, in the judgment of the Sessions Judge and Collector, or other officer as aforesaid, qualified, from their education and character, to serve as jurors or as assessors, respectively.

The list shall contain the name, place of abode, and quality or business of every such person; and if the person is a European or an American, the list shall mention the race to which he belongs.

Persons exempted need not necessarily be excluded from the lists here referred to; they may claim exemption if they so see fit. (*Vide* Section 406, *post.*)

(330) 401. Copies of such list shall be stuck up in the office of the Collector or other officer as aforesaid, and in the Court-house of the Magistrate of the District, and of the Chief Civil Court, and in some conspicuous place in the town or towns near, or in the vicinity of which the persons named in the list reside.

Publication of list.

To every such copy shall be subjoined a notice, stating that objections to the list will be heard and determined by the Sessions Judge and Collector, or other officer as aforesaid, at the Sessions Court-house, and at a time to be mentioned in the notice.

(331) 402. For the hearing of such objections, the Sessions Judge shall sit with the Collector, or other officer as aforesaid, and shall at the time and place mentioned in the notice, revise the list and hear the objections (if any) of persons interested in the amendment thereof, and shall strike out the name of any person not suitable in their judgment to serve as a juror or as an assessor, or who may avail himself of the exemption from service given by Section 406, and insert the name of any person omitted from the list whom they deem qualified for such service.

Revision of list.

In the event of a difference of opinion between the Collector, or other officer as aforesaid, and the Sessions Judge, the name of the proposed juror or assessor shall be omitted from the list.

A copy of the revised list shall be signed by the Sessions Judge and Collector, or other officer as aforesaid, and sent to the Court of Session.

Any order of the Sessions Judge and Collector, or other officer as aforesaid, in preparing and revising the list shall be final.

(332) 403. The list so prepared and revised shall be again revised once in every year.

Annual revision of list.

The list so revised shall be deemed a new list, and shall be subject to all the rules hereinbefore contained as to the list originally prepared.

(333) 404. All male persons between the ages of twenty-one and sixty, resident within the local limits of the jurisdiction of the Court of Session, except those hereinafter mentioned, shall be deemed capable of serving as jurors and assessors, and shall be liable to be summoned accordingly.

(334) 405. The following persons are incapable of serving as jurors or as assessors, namely :—
Disqualifications. Persons who hold any office in or under the said Court.
Persons executing any duties of Police, or entrusted with any Police functions.

Persons who have been convicted of any offence against the State, or of any fraudulent or other offence which, in the judgment of the Sessions Judge and Collector, renders them unfit to serve on the jury.

Persons afflicted with any infirmity of body or mind, sufficient to incapacitate them from serving.

Persons who, by habit or religious vows, have relinquished all care of worldly affairs.

The Madras High Court, in their rules of February, 1862, held that pleaders are not incapable of serving as jurors or assessors.

(335) 406. The following persons are exempt from the liability to serve as jurors or as assessors, namely :—

All officers in civil employ superior in rank to a Magistrate of the District.

Judges and other judicial officers.

Commissioners and Collectors of Revenue or Customs.

All persons engaged in the Preventive Service in the Customs department.

All persons engaged in the collection of the revenue whom the Collector thinks fit to exempt on the ground of official duty.

Chaplains and others employed in religious offices.

All persons in the Military Service, *except when by any law in force for the time being such persons are specially made liable to serve.*

Surgeons and others who openly and constantly practise in the profession of physic.

Persons employed in the Post Office and Electric Telegraph departments.

Persons actually officiating as priests in their respective religions.

All persons exempted by *the Local Government*, and persons exempted by Government from personal appearance in Court under the provisions of the Code of Civil Procedure, Section 22.

The exemption from service given by this section is a right of which each person exempted may avail himself or not.

Person exempted is not bound to avail himself of his right of exemption.

Nothing contained in this section shall be construed to disqualify any such person, if he is willing to serve as a juror or as an assessor.

The Sessions Judge may issue a summons to any exempted person to serve as an assessor or juror on the trial of a European British subject.

By Section 56, Act VII of 1872 (the Burma Courts Act), European officers in the military service, commissioned and non-commissioned, resident within ten miles of the place of the sitting of the Court, are liable to serve as jurors for the trial of European British subjects.

See Section 30, Act IV of 1866. Exemption does not extend to persons in the military service with reference to the Punjab Chief Court, unless such exemption be asked for by the commanding officer on military grounds.

By the provisions of this section the Local Government is given the power to exempt persons. The words *Local Government* were not in this section as it stood originally. The other portions of section printed in italics have been added by the present Act X of 1872.

(336) 407. The Court of Session shall ordinarily, three days at the least before the time fixed for the holding of sessions, *send a precept to a Magistrate directing him to summon as many persons named in the said revised list as seem to the Court to be needed for trials by jury and trials with the aid of assessors at the said sessions, the number to be summoned not being less than double the number required for any case about to be tried at such sessions.*

Court to summon jurors.

The names of the persons to be summoned shall be drawn by lot in open Court, excluding those on the revised list who have served within six months, unless the number cannot be made up without them; the names so drawn shall be specified in the precept to the Magistrate.

The object of the law is, that the same person shall not be called on to serve as assessor more than once in six months. The extension of the

list of assessors is a point, therefore, that should not be lost sight of, not only to relieve assessors, already on the list, of an amount of work which might prove distasteful, but also to extend the knowledge of the system.

Send a precept, &c.—The precept issued by the Sessions Judge under this section, requiring persons to be summoned to serve as assessors or jurors, need not be directed to Magistrate of District, but may, if expedient, be addressed to the nearest officer exercising any of the powers of a Magistrate (Sud. Pro., 1862 ; Madras Rules, p. 1).

Not being less than double the number required.—Section 407 does not require a double set of assessors to be summoned for each case about to be tried, but not less than double the number required for any one case. The exact number to be summoned at each Sessions is left entirely to the discretion of the Court of Sessions, whose aim should be to render the duty of sitting on Session trials as little onerous as possible, by abstaining on the one hand from requiring the attendance of more persons than may be reasonably necessary, and by providing on the other for a change of assessors after the trial of every third or fourth case (H. C. Pro., 11th February, 1863).

(349) 408. When a trial is to be held in which the accused person, or one of the accused persons, is entitled to be tried by a jury constituted under the provisions of Section 234, the Court of Session shall, three days at least before the day fixed for holding such trial, cause to be summoned in the manner hereinafter prescribed as many European and American jurors as are required for the trial, if there be so many on the jury-list of the district in which the trial is to be held.

The Court shall also at the same time in like manner cause to be summoned the same number of other persons named in the revised list, unless such number of such other persons shall have been already summoned for jury trials at that session.

From the whole number of persons returned, the jurors who are to constitute the jury shall be taken by lot in the manner prescribed in Section 240, until a jury containing the proper number of Europeans or Americans, or a number approaching thereto as nearly as possible, has been obtained.

If a jury containing the requisite number of Europeans and Americans be not obtained, the accused person may elect to be tried by the Judge with the aid of assessors ; otherwise he shall be tried by the jury obtained by the means aforesaid.

Summoning and em-
panelling jurors under
Section 234.

(337) 409. Every summons to a juror or assessor shall be in writing, and shall require his attendance as a juror or assessor at a time and place to be therein specified.

Form and service of summons.

The summons, or a copy thereof, shall be served on every juror or assessor personally.

If the juror or assessor summoned be absent from his usual place of abode, the summons may be left for him there with some adult male member of his family residing with him.

(338) 410. The Court of Session may direct jurors or assessors to be summoned at other periods than the period specified in Section 407, when the number of trials before the Court renders the attendance of one set of jurors or assessors for a whole session oppressive, or whenever it is found to be necessary.

Power to summon another set of jurors or assessors.

(339) 411. If any person summoned to serve as a juror or assessor be in the service of Government *or of a Railway Company*, the summons shall be sent to him through the head officer of the office in which he is employed, and the Court may excuse the attendance of such person if it appear, on the representation of such head officer, that the person summoned cannot serve as a juror or assessor without inconvenience to the public service.

Service of summons on officer of Government.

Or of a Railway Company.—These words have been added to this section by the present enactment, Act X of 1872.

(340) 412. The Court of Session may excuse any juror or assessor from attendance for reasonable cause.

Court may excuse attendance of jurors or assessors.

This and the three preceding sections are made applicable to trials held by the Chief Court of the Punjab, by Section 30, Act VI of 1866.

(341) 413. At each session the Court shall cause to be made a list of the names of those who serve as jurors or assessors at such session.

List of jurors or assessors attending.

Such list shall be kept with the revised list of the jurors and assessors prepared under Section 402.

A reference shall be made in the margin of the said

revised list to each of the names which are mentioned in the list prepared under this section.

(354) 414. Any person summoned to attend as a juror or as an assessor, who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the Court, *or fails to attend after an adjournment of the Court, after being ordered to attend*, shall be liable by order of the Court of Session to a fine not exceeding one hundred rupees.

Such fine shall be levied by the Magistrate of the District by attachment and sale of any movable property belonging to such juror or assessor within the jurisdiction of the Sessions Court making the order.

In default of recovery of the fine by such attachment and sale, such juror or assessor may be imprisoned in the civil jail for the space of fifteen days if the fine be not sooner paid.

Or fails to attend, &c., have been added to the provisions of the present section by the present enactment, Act X of 1872.

Section 229 I. P. C. provides for the punishment of any one personating a juror or assessor.

CHAPTER XXX.

MISCELLANEOUS PROVISIONS.

This chapter contains the provisions of Chapter IX, Act XXV of 1861, Sections 130 to 132 C, and Sections 431 and 438, Chapter XXXI of Act XXV of 1861.

(130) 415. The seizure by any Police Officer of property alleged or suspected to have been stolen, or found under circumstances which create suspicion of the commission of any offence,
Procedure by Police upon seizure of stolen property.

shall be forthwith reported to a Magistrate, who shall thereupon make such order respecting the custody and production of such property as he thinks proper.

If such property *is of a perishable nature*, or if it appear to the Magistrate that its sale would be for the benefit of the owner, such Magistrate may at any time direct it to be sold, and shall hold the proceeds of such sale in trust for the owner, subject to the provisions contained in Sections 416 and 417.

This section was substituted for Section 4, Act VIII of 1869. Under Act XXV of 1861, the Magistrate of the District alone had power to make an order respecting custody of such property. All Magistrates, except subordinate Magistrates of the second class, may order sale of property seized under this section, if it appears that the sale would be for the benefit of the owner. The proviso added to this section by the present Act, X of 1872, authorizes Magistrates of the District to give the powers herein contained to subordinate Magistrates of the second class.

(131) 416. When the owner of any such property is unknown, the Magistrate may detain it, or the proceeds thereof if sold, and, in case of such detention, shall issue a proclamation specifying the articles of which such property consists or consisted, and requiring any person who may have a claim thereto, or to the proceeds thereof, to appear before him and establish his claim within six months from the date of such proclamation.

There is no power, either at Common Law or by Statute, for a Judge to make any direction as to the disposal of chattels found on a felon which do not belong to the complainant. But it is otherwise under the C. C. P., as this Section 416 provides for this. Where a prisoner is acquitted of the offence with which he is charged, the Court should not order the property to be given to the prosecutor, in respect of which the offence was charged (5 W. R., 55). As to unclaimed property see Sections 25-27, Act V of 1861.

(132) 417. If no person within such period establishes his claim to such property or proceeds, and if the person in whose possession such property was found is unable to show that it was legally acquired by him, such property shall be at the disposal of the Government, *and may be sold* under the

orders of the Magistrate of the District, or a Magistrate of a Division of a District, or, if duly authorized, a Magistrate of the first class, or, if it has been already sold by the Magistrate, the proceeds thereof shall be at the disposal of the Government.

An appeal shall be allowed to the Court to which appeals against sentences would lie in the case of every order passed under this section.

And may be sold.—The order of confiscation alluded to in this section cannot be issued unless the provisions of the preceding section and this section are adhered to.

(132 A) 418. When the trial in any Criminal Court is concluded, the Court may make such order as appears right for the disposal of *any property produced before it* regarding which any offence committed. *Order for disposal of property regarding which offence committed.*

Property produced before it.—The Court, it must be borne in mind, has no jurisdiction unless the property is produced before it. It is not now necessary that the Court's order be made at the time of passing judgment, as formerly required.

Unless the sale take place in market overt, a *bond fide* purchaser of stolen property acquires no title to it; he must restore the property to the original owner, looking to the seller for his remedy (7 P. R., 12). The Court can under this section order the disposal of property with reference to which an offence has been committed, but if an accused person has criminally misappropriated the property in question, the property has not passed by the act of the accused selling it; he could not confer a title to it anyhow by sale at a fair or anywhere (see the principle explained in the Contract Law, 1872, which maintains the right of the original owner), provided that he did obtain it unlawfully (7 P. R., 12). In the above case the property alluded to was a mare.

Property suspected of being stolen may be confiscated under this section, although the person charged with stealing it is discharged (8 P. R. Cr. J., 20).

Amendment 38 of 1874.—In Section 418, before the word “trial,” the words “inquiry or” shall be inserted; and to the same section the following explanation shall be added (namely):—

“EXPLANATION.—In this section the term ‘property’ includes not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been

converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise."

(132 B) 419. Any Court of Appeal, Reference, or Revision may direct any such order passed by a Court subordinate thereto to be stayed, and may modify, alter, or annul it.

(132 c) 420. The order passed by any Court under Section 418 or 419 may be in the form of a reference of the property to the Magistrate of the District, or to a Magistrate of a Division of a District, who shall in such cases deal with it as if the property had been seized by the Police and the seizure had been reported to him in the manner hereinbefore mentioned.

(438) 421. Subject to any rules that may be passed by the Local Government, with the previous sanction of the Governor-General of India in Council, the Criminal Courts may order payment on the part of Government of the reasonable expenses of any complainant or witness attending for the purpose of any trial before such Court under this Act.

This section as it now stands was substituted for the original section, by Section 4, Act VIII of 1869. Under the provisions of Act XXV of 1861, the payment of such expenses was limited to cases before the Court of Session.

(431) 422. When the services of an interpreter are required by any Criminal Court for the interpretation of any evidence or statement, he shall be bound to state the true interpretation of such evidence or statement.

This section differs somewhat from the old Section 431. In the latter the words "such interpreter shall be sworn in the manner provided for witnesses by any law for the time being in force" appeared—here the swearing portion is omitted.

CHAPTER XXXI.

LUNATICS.

This chapter contains the provisions of Chapter XXVII, Act XXV of 1861, as amended by Act VIII of 1869.

(388) 423. When any person charged with an offence before a Magistrate competent to try the case, appears to such Magistrate *to be of unsound mind* and incapable of making a defence, such Magistrate shall institute an inquiry to ascertain the fact of such unsoundness of mind, and shall cause the accused person to be examined by the Civil Surgeon of the District, or some other medical officer, and thereupon *shall examine such Civil Surgeon or other medical officer* as a witness, and shall reduce the examination into writing.

If such Magistrate is of opinion that the accused person is of unsound mind, he shall stay further proceedings in the case.

The words *as a witness* have been added to this section by the present Act, X of 1872. This section, it will be seen, refers only to cases which a Magistrate "is competent to try," and not to cases which he commits for trial.

Insanity at the time of committing an offence is undoubtedly among the general exceptions of which the existence in any case will negative crime; but there is this difference in the case of this particular exception, that while it bars punishment, yet the establishment of it, combined with proof that the act was committed, authorizes the detention of the prisoner under certain rules. A specific procedure has therefore been laid down to be followed in such cases in this chapter.

To be of unsound mind.—The following leading definitions of a sound and unsound mind are given by Shelford :—"A *sound mind*," says Shelford, "is wholly free from delusion" [all *popular* delusions of course being excepted]; "all the intellectual faculties existing in a certain degree of vigour and harmony, the propensities, affections, and passions being under the subordination of the judgment and will, the former being the controlling power with a just perception of the natural connection or repugnancy of ideas. Weak minds, again, differ from strong in the extent and power of their faculties; but, unless they betray symptoms of a total loss of

understanding, and of idiotcy, or of delusions, they cannot be considered unsound. An *unsound mind*, on the contrary, *is marked by delusions*" [which are not popularly entertained], "mingles ideas of imagination with those of reality, those of reflection with those of sensation, and mistakes the one for the other; and such delusion is often accompanied with an apparent insensibility to or perversion of those feelings which are peculiarly characteristic of our nature. Some lunatics, for instance, are callous to a just sense of affection, decency, or honour; they hate those, without cause, who were formerly most dear to them; others take delight in cruelty; many are more or less affected at not receiving that attention to which their delusions persuade them they are entitled. Retention of memory, display of talents, enjoyment of amusing games, and an appearance of rationality on various subjects, are not inconsistent with unsoundness of mind; hence sometimes arises the difficulty of distinguishing between sanity and insanity. The man of insane mind, from disease, having been once *non compos mentis*, pertinaciously adheres to some *delusive idea*, in opposition to the plainest evidence of its falsity, and endeavours by the most ingenious arguments, however fallacious they may be, to support his opinions."—"On the Law of Lunacy," 1847.

Shall examine such Civil Surgeon, &c.—"Cuilibet in sua arte perito est credendum" ("Credence should be given to one skilled in his peculiar profession"). With respect to the admissibility in evidence of the opinion of a medical man as to the state of mind of a prisoner when on a trial for an alleged offence, the following question was recently proposed to the Judges by the House of Lords:—"Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any, and what, delusion at the time?" To the question thus proposed the majority of the Judges returned the following answer, which removes much of the difficulty which formerly existed with reference to this the most important practical application of the maxim *cuilibet in sua, &c.*, and must be considered as laying down the rule upon the subject:—"We think the medical man, under the circumstances supposed, cannot, in strictness, be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts admitted are not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right" (Ex. B. L. M., 4th edition, p. 898).

The *Madras Jurist* of the 1st January, 1872, had a very good article on this subject, headed *actus non facit reum, nisi mens sit rea*.

In preparing the annual statement of the average duration of cases in the Criminal Court, cases postponed under these sections need not be

included amongst those in which average is calculated, inasmuch as their postponement is caused by circumstances over which the Court have no control (J. C., Oudh, No. 70, 1866).

Dr. Norman Chevers, at p. 820 of his "Medical Jurisprudence," says :— "Although all human desires probably tend towards nearly the same objects, the purposes of a native are wont to be affected by trains of thought and action so utterly dissimilar to those by which our own are wrought out, that we must not always expect to be able to follow him in his mental operations, or allow ourselves to charge him with madness, when his singularity or his craft takes his conduct somewhat beyond the scrutiny of our reason."

This chapter has for its basis a maxim the rule of our law, that *furiosus solo furore punitur*—a madman is only punished by his madness. The reason of this rule obviously being that where there exists an incapacity or a defect of understanding, inasmuch as there can be no consent of the will, so the act cannot be culpable. Every man, however, is *presumed* to be sane, and to possess a sufficient degree of reason to be responsible for his actions, until the contrary has been satisfactorily proved; and in order to establish a defence on the ground of insanity, it must be clearly shown that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know what he was doing, that he did not know what he was doing was wrong. "If" said the majority of the Judges in answer to the questions proposed to them some years since by the House of Lords, relative to insane criminals, "the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong,—and this course we think is correct,—accompanied with such observations and explanations as the circumstances of each particular case may require." Where the party charged with an offence was, at the time of its commission, under the influence of insane delusion, the application of the general rule above laid down is in practice often attended with considerable difficulty, and the rule itself will require to be modified according to the peculiar nature of the delusion, and the infinite diversity of facts which present themselves in evidence. The following rules and illustrations, mentioned by the learned Judges, will be found to throw considerable light upon this interesting and difficult question :—1st. Where an individual labours under an insane delusion in respect of some particular subject or person, and knew, at the time of committing the alleged crime, that he was acting contrary to law, he will be punishable according to the nature of the crime committed. And, 2ndly, where such delusion is as to existing facts, and the individual labouring under it is not, in other respects, insane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion existed were real. For instance, if a man under the influence of his delusion supposes another to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment

whereas, if his delusion was that the deceased had inflicted a serious injury upon his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

(226 A) 424. When, from the evidence given before a Magistrate, there appears to be sufficient ground for believing that the accused person committed an act which, if he had been of sound mind, would have been an offence triable exclusively by the Court of Session, and that he was at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing the nature of the act charged, or that he was doing what was wrong or contrary to law, such accused person shall, if he appears to be sane at the time of inquiry, be sent for trial by the Magistrate before the Court of Session.

If such accused person is a European British subject, the Magistrate shall follow the procedure prescribed in Chapter VII.

If an accused person appears to be insane at the time of inquiry, the Magistrate shall act in the manner provided in the last preceding section.

This section was added to the original C. C. P., Act XXV of 1861, by Section 4, Act VIII of 1869, and contains a rule made by the Calcutta High Court.

The law now clearly states the rule laid down by the Calcutta High Court in 9 S. W. R., 23, that it is only when the prisoner is sane at the time of the inquiry or preliminary investigation that he is to be committed for trial.

Triable exclusively by a Court of Sessions.—Under this section, if a Magistrate believes a lunatic to have committed an offence triable *exclusively* by a Court of Session, he must be sent for trial before that Court, which will take action under Section 426, *post*.

(389) 425. If any person committed for trial before a Court of Session shall at his trial appear to the Court to be of unsound mind and incapable of making his defence, the Court shall *in the first instance try the fact of such unsoundness of mind*, and if satisfied of the fact, shall give a special judgment that the accused person is of unsound mind and incapable of making his defence, and thereupon the trial shall be postponed.

Amendment 39 of 1874.—To Section 425, the following clause shall be added (namely):—

“The trial of the fact of the unsoundness of mind of the accused person shall be deemed to be part of his trial before the Court.”

In the first instance.—By the use of these words it is clear that the legislature intended the trial of this issue of insanity to be considered as part of the trial of the accused before the Court, *i.e.*, the preliminary issue must be tried by the jury or assessors and not by the judge himself personally. Read this section 425 with section 232, *ante*, on this point (10 B. L. R., App. 11).

Try the fact, &c.—If a Judge or Magistrate has doubts as to the sanity of a prisoner, he should not be content merely in questioning him, but should try the fact of his sanity or insanity by examining the civil surgeon, and by taking evidence from the village where the prisoner lived, in order to ascertain whether he was insane at the time he committed the alleged offence, or whether he became insane afterwards, or whether he were insane at all (1 Bom. H. Ct. R., p. 33).

It is altogether irregular to try, as a preliminary point, before proceeding with the trial, whether the prisoner was of unsound mind at the time of committing the offence. This is an issue, among others, on which the finding as to the guilt or innocence of the prisoner depended, and was, therefore, one for determination at the conclusion of the trial. The only circumstances under which the question of unsound mind should be preliminarily decided, are those described in this and Section 423, with the view of determining whether the prisoner is capable of making his defence.—*S. N. A. Agra, Mt. Lounge*, 1862, 53.

The following remarks on the competency of medical men in general to give evidence in criminal cases where the defence is lunacy, are taken from an article in the *Law Times* of 31st August, 1872. This subject is one of as great, if not greater importance in this country than in England, where the civil surgeon may be young and inexperienced, or old and ignorant, for it is not every civil surgeon, who, in an out-of-the-way small station for years, with no practice save that of extracting stones at the dispensary, or making an occasional *post-mortem* examination, and no books of reference, save those he may himself purchase, has the power to keep himself acquainted with all the discoveries of his science, and what wonder, considering the drawbacks of the climate and the solitude with which he is weighted, the probabilities are, that in many instances he forgets a deal more than he learns; and, in the absence of the civil surgeon, Section 423, *ante*, provides for the evidence of "*other medical officer*," probably a native apothecary. Surely the fitness of such medical officers to give evidence in criminal cases, where the defence is lunacy, is a question of no little importance.

"For the purposes of this question it matters little," says the *Law Times*, "whether a prisoner is really mad or not; the real point is, that there does not exist some provision in the country for securing the services of doctors in such cases who will be able to give not merely time but the greatest experience to all criminal cases where the defence is lunacy. It is impossible for a doctor to pronounce a man mad without giving long and earnest attention to all things connected with the patient, and that long and earnest attention cannot be bestowed as it should be without the fullest experience. This experience cannot be obtained without special training, and it is in this special training that most of our medical men are deficient, and when those who have it are too few in number to supply the wants of this country. The *Lancet*, speaking on this subject, says:

"It may be admitted that medical men, from the want of special training in medico-psychology, theoretical and clinical, are sometimes put in positions unusually delicate and difficult. Called upon to pronounce a man sane or insane, they lack the power of diagnosis; they are either too subtle or too lax in their estimate of symptoms, and conflict of opinion occurs among them to the amusement of counsel, the embarrassment of the jury, and the impatience of the Judge. For this undeniable state of things there is but one remedy. Let every candidate for medical diploma or licence be expected to come prepared, by clinical study, for examination in lunacy Before, however, this qualification is attainable, the student must have opportunities for studying lunacy."

It cannot, of course, be expected that we can, at the present moment, command the same skill here in India as can be relied on in England; all I urge is, that the testimony in cases of this nature be the best procurable; for it must be remembered that men's lives hang on the doctor's evidence, and the competency and fitness of the medical officer to give evidence, and the value of his evidence, are points which deserve to be fully considered. That the question of lunacy in this country is one fraught with much difficulty, *vide* remarks by Dr. Chevers, given at page 230, *ante*, under Section 423.

(390) 426. Whenever an accused person is found to be of unsound mind and incapable of making his defence, the Magistrate or Court of Session, as the case may be, if the offence of which such person is accused be bailable, may release such person on sufficient security being given that he shall be properly taken care of, and shall be prevented from doing injury to himself or to any other person, and for his appearance when required.

If the offence be not bailable, or if the required bail be not given, the accused person shall be kept in safe custody in such place as the Local Government to which the case shall be reported shall direct.

A person was placed in a lunatic asylum under this section, and was detained there after he recovered his reason. His detention was held to be wrongful, but not illegal (Bom. H. Ct. R. for 1863, 173).

The Chief Commissioners of Oudh, Central Provinces, and British Burmah have the powers of a Local Government under this section. The Chief Commissioner of Oudh has in his Circular, No. 66 of 1870, laid down the procedure to be followed in carrying out the provisions of this section.

(391) 427. Whenever an inquiry or a trial is postponed

under Section 423 or Section 425, the Magistrate or Court of Session, as the case may be, *may at any time resume the inquiry or trial*, and require the accused person, if detained in custody, to be brought before such Magistrate or Court, or, if the accused person has been released on security, may require his appearance.

The surety of such person shall be bound at any time to produce him to any officer whom the Magistrate or Court of Session appoints to inspect him, and *the certificate of such officer* shall have the same effect as the certificate of an Inspector-General of Prisons, or the visitors of Lunatic Asylums, granted under Section 432.

The terms "*an inquiry or trial*" have been substituted by the present enactment for "*investigation*."

May at any time resume, &c.—Where a Magistrate remanded a prisoner on account of his inability to make his defence from unsoundness of mind, his successor should take up the case under this section on the convalescence of the accused (6 W. R., 3).

The certificate of such officer.—The certificate mentioned in the above section, also report of officer, may be received as evidence.

(392) 428. If, when the accused person appears or is again brought before the Magistrate or the Court of Session, as the case may be, it appears to such Magistrate or Court that the accused person is in a fit state of mind to make his defence, *the inquiry* shall proceed, or the accused person shall be put on his trial, as the case may require.

If it appears that the accused person is still of unsound mind, and incapable of making his defence, the Magistrate or Court of Session shall again act according to the provisions of Section 423 or Section 425.

The term *inquiry* has been substituted by the present Act for the term *investigation*.

(393) 429. Whenever any person is acquitted upon the ground that, at the time at which he is charged with having committed an offence, he was, by reason of unsoundness of mind,

Resumption of investigation or trial.

Procedure on accused appearing before Magistrate or Court of Session.

Finding in case of acquittal on ground of being lunatic.

incapable of knowing the nature of the act charged, or that he was doing what was wrong or contrary to law, *the finding shall state specially whether such person committed the act or not.*

The finding shall state, &c.—The terms of the law must be strictly followed. In recording the finding, in cases falling under this section, the prisoner cannot be found guilty of the offence charged, and then acquitted on the ground of insanity, for this would include two opposite verdicts in one and the same finding.

When a Magistrate, inquiring into a case triable only by a Court of Sessions, finds that the accused, though capable of making a defence on his examination, was insane at the time of the commission of the act, which otherwise would have been an offence, he must commit the prisoner for trial, and draw up a charge in the usual way.

(394) 430. Whenever such finding states that the accused person committed the act charged, the Magistrate or Court of Session before whom the trial was held shall, if the act charged would, but for the incapacity found, have amounted to an offence, order such person to be kept in safe custody, in such place and manner as to the Magistrate or Court of Session seems fit, and shall report the case for the order of the Local Government.

The Local Government may order such person to be kept in safe custody in a Lunatic Asylum or other suitable place of safe custody.

Vide Ch. Com. of Oudh Circular, No. 66 of 1870, for the procedure to be followed in carrying out the provisions of this section.

(395) 431. When any person is confined under the provisions of Section 426 or Section 430, the Inspector-General of Prisons, if such person is confined in a jail, or the Visitors of the Lunatic Asylums, or any two of them, if he is confined in a Lunatic Asylum, may visit him in order to ascertain his state of mind, and he shall be visited once at least in every *six* months by such Inspector-General, or by two of such Visitors as aforesaid, and such Inspector-General or Visitors shall make a special report to the Local Government as to the state of mind of such person.

In this, and also in Section 434, *post*, "the Inspector-General of Prisons" has been substituted for "officer in charge of a jail," and the time of visitation to be every *six* months instead of, as before, every *three* months.

(395) 432. If such person is confined under Section 426, and such Inspector-General or Visitors as aforesaid shall certify that, in his or their opinion, such person is capable of making his defence, he shall be taken before the Magistrate or Court of Session, as the case may be, at such time as such Magistrate or Court of Session appoints; and such Magistrate or Court shall deal with such person under the provisions of Section 428, and the certificate of such Inspector-General or visitors as aforesaid shall be receivable as evidence.

(396) 433. If such person is confined under the provisions of Section 430, and such Inspector-General or Visitors as aforesaid shall certify that, in his or their judgment, he may be discharged without danger of his doing injury to himself or to any other person, the Local Government may thereupon either order him to be discharged, *or to be detained in custody* or to be transferred to a public Lunatic Asylum, if he has not been already sent to such asylum, and *may* appoint a commission, consisting of a Judicial Officer not below the grade of a Sessions Judge, and two Medical Officers, whereof the chief Medical Officer attached to the Lunatic Asylum shall be one.

The said commission shall make formal inquiry into the state of mind of such person, taking such evidence as is necessary; *and shall report to the Local Government, who may order his discharge or detention as to it may seem fit.*

The words italicised have been added or substituted by the present Act. Formerly the appointment of a commission was compulsory, and the commission so appointed had the power of ordering the discharge herein alluded to.

The old Section 396, which appeared in Act XXV of 1861, between the present Sections 433 and 434 of the present Code of Criminal Procedure, has been re-enacted by Section 31, Act V of 1871, and the schedule to that Act repealed Section 396 here alluded to.

(397) 434. Whenever any relative or friend of any person detained under the provisions of Section 430, is desirous that he shall be delivered over to his care and custody, the Local Government, upon the application of such relative or friend, and on his giving security to the satisfaction of such Government that the person detained shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, may make an order that such person may be delivered to such relative or friend.

Delivery of lunatic
to care of relative.

Whenever such person is so delivered over, it shall be upon condition that he shall be subject to the inspection of such officer as the Local Government appoints, and at such times as such Government directs.

The provisions of Sections 431 and 433 shall apply to persons detained under the provisions of this section, and the certificate of the inspecting officer appointed under this section shall be dealt with as a certificate of the Inspector-General of Prisons, or the Visitors of Lunatic Asylums, under the said sections.

The Governor-General, under Act XXXII of 1867, delegated to the Chief Commissioners of Oudh, the Central Provinces, and Burmah, the powers conferred on a Local Government under this and the three preceding sections. (See *Gazette of India*, 1867, p. 1223; and *id.*, 1868, p. 44.)

CHAPTER XXXII.

CONTEMPTS OF COURT.

This chapter contains the provisions of Chapter X, Act XXV of 1861. It provides a summary procedure for contempts of Court. The contempts referred to in Section 435 are all *actual* contempts; for it should be borne in mind that there are contempts and contempts; *i.e.*, *actual contempts*, or an insult to or attack on the Court itself; and *constructive contempt*, or an attack on third persons, tending *indirectly* to interfere with the course of justice; *e.g.* the speeches made by Messrs. Onslow and Whalley in St. James's Hall, on 11th and 12th December, 1872, on the Tichborne case; although, from certain remarks dropped by Blackburn, J., in the course of that proceeding, it would appear that the distinction between actual and constructive contempt is *merely* technical, and that *practically* no distinction can be made. But the opposite view, I take it, is capable of argument. In the case of contempt of Court by a Mr. Skipworth and the Tichborne Claimant, heard in the Court of Queen's Bench, Jan. 20, 1873, the Court observed:—"The word 'contempt' has caused persons who are not lawyers to suppose that it means a proceeding to protect the personal dignity of the Judges from insult to them as individuals, and sometimes, no doubt, persons have been committed for such personal attacks, although, so far as their protection as individuals is concerned, that is a subordinate object, and the cases are very rare in which the Judges would consider it worth their while to interpose on that ground. But there is another and more important object for which it may be necessary to interpose. Any case which is pending, either in a civil or criminal Court, ought to be tried in the ordinary course of justice, and in the present case there is an indictment against one of the persons before us which is now standing for trial. That case ought to be fairly tried; but it may happen that proceedings occur such as have now called upon us to interfere. Sometimes the course taken has been by attacking the Judge; sometimes by attempting to induce him to alter his opinion, or to take a course different from that which he would otherwise take; more commonly, there is an attempt to influence the trial by attacking the witnesses or appealing to public feeling so as to prejudice the trial. In all these ways great mischief may be done, interfering with the due and ordinary course of justice. When the attempt is by an act which is itself punishable, as conspiracy, libel, or assault, the party might, of course, be indicted for it; but the prosecution, though sufficient for the purpose of punishment, might be made greater for the purpose of prevention; the mischief might be done, and the administration of justice would be perverted or prejudiced. *For that reason, from the earliest times, the Superior Courts of Law and Equity have exercised the jurisdiction of prosecuting such attempts by summary pro-*

ceedings for contempt; and, having that power, it is our duty, when the occasion arises, to exercise it."

Regulation III of 1803, Sections 22 to 26, are for punishment of contempt of Court. These sections confer larger powers for the offence than the Penal Code, and therefore were not included in Act XVII of 1862, the Repealing Act.

(163) 435. When any such offence as is described in Sections 175, 178, 179, 180, or 228 of the Indian Penal Code *is committed in the view or presence* of any Civil, Criminal, or Revenue Court, the Court may cause the offender, whether he be a European British subject or not, to be detained in custody, and, at any time before the rising of the Court, *on the same day*, may take cognizance of the offence; and adjudge the offender to punishment by fine not exceeding two hundred rupees, *and in default of payment*, by imprisonment in the civil jail for a period not exceeding one month, unless such fine be sooner paid.

In every such case the Court shall record the facts constituting the offence, with any statement the offender may make, as well as the finding and sentence.

If the offence is under Section 228 of the Indian Penal Code, the record must show the nature and stage of the judicial proceeding in which such public servant was sitting, and the nature of the interruption or insult offered.

The contempts referred to in this section are actual contempts, and, consequently, from their nature, necessarily require instant action on the part of the Court: hence the summary procedure herein provided.

Prevarication by a witness may be, though it does not necessarily amount to, contempt of Court within the meaning of Section 228, Indian Penal Code, and this Section 435 (10 Bo. H. C. R., 69).

Is committed in view or presence of.—Where, in punishment for contempt of Court, the procedure sanctioned by this section is followed, the Court must sit as the Court before which the offence was committed, and not in any other capacity. (*On the same day*), and is bound to take cognizance of the contempt on the day on which it was committed. In a case not dealt with in the summary manner herein laid down, the offender must be tried by an officer other than the person before whom the offence was committed (12 W. R., 18).

Imprisonment only *in default of payment*.

(163) 436. If the Court, in any case, considers that a person, accused of any such offence, should be imprisoned otherwise than in such default of payment of fine, or that a fine exceeding two hundred rupees should be

Procedure where Court considers that accused should be imprisoned, or fined more than 200 rupees.

imposed upon him, such Court, after recording the facts constituting *the offence*, and the statement of the accused person, as before provided, shall forward the case to a Magistrate, or, if the accused person be a European British subject, to a Magistrate of the first class who is a Justice of the Peace, and a European British subject; and shall cause bail to be taken for the appearance of such accused person before such Magistrate, or, if sufficient bail be not tendered, shall cause such person to be forwarded under custody to such Magistrate.

If the case be forwarded to a Magistrate, he shall proceed to try the accused person in the manner provided by this Act for trials before a Magistrate; and such Magistrate may adjudge the offender to punishment, as provided in the section of the Indian Penal Code under which he is charged.

If, in the case of a European British subject, the Magistrate to whom he is forwarded considers the offence to require a more severe punishment than he is competent to award under Chapter VII of this Act, he may commit the offender *to the Sessions Court*.

Offence.—The word *offence* has been substituted for *contempt*, and the *Session Court* substituted for *Supreme Court of Judicature* both in this section and Section 438, *post*.

In no case tried under this section shall any Magistrate adjudge imprisonment or a fine exceeding two hundred rupees for any contempt committed in his own presence against his own Court.

Shall cause bail to be taken.—In a case of contempt, the Court before which the offence is committed is bound under this section to accept bail, if sufficient bail is tendered.

A contempt of Court is promptly punishable on the motion of the Court in which it had occurred. Where a Magistrate to whom the case had been committed refused to act, and the Court referring the case took no further notice, *Held*, that another Civil Court in which the contempt did *not* occur could not subsequently, on the action of some general inquiry, recommend the revival of that specific case of contempt (*H. C. C.*, 3 W. R., p. 11, c. 4).

(164) 437. When any Court has adjudged an offender to punishment, or forwarded him to a Magistrate for trial, *for refusing or omitting to do anything* which he was lawfully re-

Discharge of offender on submission or apology.

quired to do, or for any intentional insult or interruption, the Court may discharge the offender, or remit the punishment, on his submission to the order or requisition of such Court, or on apology being made to its satisfaction.

Compare the provisions of Section 22, Act XXIII of 1861, with the provisions of this section. The former refers to Civil Courts.

For refusing or omitting to do.—Court can punish any person summarily for committing in its presence the following contempts:—

(1) Intentionally omitting to produce a document; (2) refusing to be sworn; (3) refusing to answer questions on examination; (4) refusing to sign a statement when bound to do so; (5) intentionally insulting or interrupting the Court (3 W. R. Cr. R., 21).

(165) 438. When any such offence as is described in Chapter X of the Indian Penal Code, except Sections 175, 178, 179, 182, and 228, is committed in contempt of any Civil, Criminal, or Revenue Court by a European British subject, such offence shall be cognizable only by a Magistrate of the first class who is a Justice of the Peace and a European British subject, and such Magistrate may deal with the offender on conviction in the same manner as is provided in that behalf in Section 74.

If such Magistrate considers the offence to require a more severe punishment than he is competent to award under the said section, he may commit the offender to the Session Court.

PART X.

CHARGE, JUDGMENT, AND SENTENCE.

CHAPTER XXXIII.

OF THE CHARGE.

This chapter, which deals with the system of criminal pleading, was drawn up by Mr. Stephens himself, with the view of making as clear and plain as possible a matter which in England has given rise to an inordinate amount of quibbling and chicanery. Mr. Stephens, in his speech introducing the report of the select committee on the C. C. P. Bill, says he is "peculiarly responsible for the provisions of this chapter," and that, "under these sections the worst that can happen is that the Court may think that the prisoner has been misled, and that he ought to have a new trial."

This chapter contains the spirit of the provisions of Chapter XIII, Act XXV of 1861, and has been so fully illustrated by the framers thereof, and so carefully remodelled as to supersede a large number of cases which have been decided on with reference to the wording of these sections as they originally stood.

The subject of charges is thus dealt with in this Code :—Under *Chapter XV, of Inquiries and Trials*.—When the Magistrate determines to send the accused before the Court of Sessions or High Court for trial, he must, after the evidence has been recorded, make a written instrument under his hand and seal, *i.e.* a charge. The next, under *Chapter XVI, of Summons Cases*.—No formal charge is necessary; all that is requisite is for the Magistrate to state the substance of the complaint to the accused. Next comes *Chapter XVII, of Warrant Cases*.—Under the provisions of this chapter a charge in writing is essential. And then, under *Chapter XVIII*—the new chapter, *dealing with Summary Trials*,—it is provided that in cases in which no appeal lies, or, in other words, in cases in which a sentence of imprisonment not exceeding three months, or fine not exceeding two hundred rupees, or whipping, is passed, the Magistrate or Bench of Magistrates need not draw up a formal charge. This is briefly an epitome of the law on this subject in the Code of Criminal Procedure, under the chapters above quoted.

FORM OF CHARGES.

(234 to 237) 439. The charge shall state the offence Charge to state offence. with which the accused person is charged.

Specific name of offence, sufficient statement. If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

How stated where offence has no specific name. If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the prisoner notice of the matter with which he is charged.

The Act and section or sections of the Act against which the offence is said to have been committed must be referred to in the charge.

What implied in charges. The fact that the charge is made shall be equivalent to a statement that every legal condition, necessary by law to constitute the offence charged, was fulfilled in the particular case.

Language of charge. The charge may be written either in English or in the language of the district. If not written in a language understood by the prisoner, it must be read to him in a language which he understands.

Previous conviction to be set out in charge. If the accused person has been previously convicted of any offence, and if it is intended to prove such previous conviction for the purpose of affecting the punishment which is to be awarded, the fact of the previous conviction must be stated in the charge. If it is omitted, it may be added at any time before sentence is passed, but not afterwards.

Illustrations.

(a.) A is charged with the murder of B.

This is equivalent to a statement that A's act fell within the definition of murder given in Sections 299 and 300 of the Indian Penal Code; that it did not fall within any of the general exceptions of the Penal Code; and that it did not fall within any of the five exceptions to Section 300; or that, if it did fall within Section 1, one or other of the three provisos to that exception applied to it.

(b.) A is charged, under Section 326 of the Indian Penal Code, with voluntarily causing grievous hurt to B, by means of an instrument for shooting: this is equivalent to a statement that the case was not provided for by Section 335 of the Indian Penal Code, and that the general exceptions did not apply to it.

(c.) A is accused of murder, cheating, theft, extortion, adultery, or criminal intimidation, or using a false property-mark. The charge may state that A committed murder, or cheating, or theft, or extortion, or adultery, or criminal intimidation, or that he used a false property-mark, without reference to the definitions of those crimes contained in the Indian Penal Code; but the sections under which the offence is punishable must, in each instance, be referred to on the charge.

(d.) A is charged, under Section 184 of the Indian Penal Code, with intentionally obstructing a sale of property offered for sale by the lawful authority of a public servant. The charge should be in those words.

440. The charge shall contain such particulars as to the time and place of the alleged offence, and the person against whom it was committed as are reasonably sufficient to give notice to the person accused of the matter with which he is charged.

441. When the nature of the case is such that the particulars mentioned in Sections 439 and 440 do not give sufficient notice to the person accused of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed, as will be sufficient for that purpose.

Illustrations.

(a.) A is accused of the theft of a certain article at a certain time and place. The charge need not set out the manner in which the theft was effected.

(b.) A is accused of cheating B at a given time and place. The charge must set out the manner in which A cheated B.

(c.) A is accused of giving false evidence at a given time and place. The charge must set out that portion of the evidence given by A which is alleged to be false.

(d.) A is accused of obstructing B, a public servant, in discharge of his public functions at a given time and place. The charge must set out the manner in which A obstructed B in the discharge of his functions.

(e.) A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B.

(f.) A is accused of disobeying a direction of the law with intent to save B from punishment. The charge must set out the disobedience charged and the law infringed.

442. The charge may be in the form given in the third schedule to this Act, or to the like effect.

443. No error either in the way in which the offence is stated or in the particulars required to be stated in Section 441, and no omission to state the offence or to state those particulars shall be regarded at any stage of the case as material unless the person accused was in fact misled by such error or omission.

Effect of error.

Illustrations.

(a.) A is charged, under Section 242 of the Indian Penal Code, with "having been in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit";—the word "fraudulently" being omitted in the charge. Unless it appears that A was in fact misled by the omission, the error shall not be regarded as material.

(b.) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge, or is set out incorrectly. A defends himself, calls witnesses, and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material.

(c.) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge. There were many transactions between A and B, and A had no means of knowing to which of them the charge referred, and offered no defence. The Court may infer from such facts that the omission to set out the manner of the cheating was in this case a material error.

(d.) A is charged with the murder of Khuda Baksh on the 21st January. In fact the murdered person's name was Haidar Baksh, and the date of the murder was the 20th January. A was never charged with any murder but one, and had heard the inquiry before the Magistrate, which referred exclusively to the case of Haidar Baksh. The Court may infer from these facts that A was not misled, and that the error in the charge was immaterial.

(e.) A was charged with murdering Haidar Baksh on the 20th January, and Khuda Baksh (who tried to arrest him for that murder) on the 21st January. When charged for the murder of Haidar Baksh he was tried for the murder of Khuda Baksh. The witnesses present in his defence were witnesses in the case of Haidar Baksh. The Court may infer from this that A was misled, and that the error was material.

444. Any accused person may apply to the Court by which he is tried for any amendment of the charge made against him; and in considering whether any error in any charge did in fact mislead the person accused, the Court shall take into account the fact that he did or did not make such an application.

Prisoner may apply for amendment.

(244) 445. Any Court may, either upon the application

Court may amend a charge. of the accused person, or upon its own motion, amend or alter any charge at any stage of the proceedings before judgment is signed, or, in cases of trials before a Court of Session, before the verdict of the jury is delivered or the opinion of the assessors is expressed. Such amendment shall be read and explained to the accused person.

446. If a prisoner is committed to the Court of Session, either without any charge at all, or upon a charge which the Court, upon reference to the proceedings before the committing Magistrate, considers improper, the Court of Session may draw up a charge for any offence which it considers to be proved by the evidence taken before the committing Magistrate; a copy of such charge shall be given to the person accused.

(245) 447. If the amendment or alteration is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused person in his defence, *it shall be at the discretion of the Court*, after making such amendment or alteration, to proceed with the trial, as if the amended charge had been the original one.

It shall be at the discretion of the Court.—The provisions of this section should be liberally construed so as not to prejudice the accused; much is here left to the discretion of the Judge. When the charge is amended, the amended charge should be formally read over (Section 445) to the prisoner; a mere statement of the offence charged is insufficient (*S. N. A. Agra*, 1863, 27).

(246) 448. If the amendment or alteration is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused person in his defence, the Court may either direct a new trial, or suspend the trial for such period as may be necessary to enable the accused person to make his defence to the amended or altered charge; and, after hearing his defence, the Court may further adjourn the trial, to admit of the appearance of any witness whose evidence the Court may consider to be material to the case, or whom the accused person may wish to be summoned in his defence.

(247) 449. In all cases of amendment or alteration of a

Defendant may recall witnesses.

charge, the prosecutor and accused person shall be allowed to recall and examine any witness who may have been examined.

Previous sanction to be obtained, if offence in new charge require it.

450. If the offence stated in the new charge be one for which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the new charge was based.

Effect of material error.

451. If any Appellate Court, or the High Court, in the exercise of its power of revision, is of opinion that any person convicted of an offence was, in fact, misled in his defence by an error in the charge, it shall direct a new trial to be had upon a charge amended in whatever manner it thinks proper. If such Court is of opinion that the facts of the case are such that no valid charge could be preferred against the person accused in respect of the facts proved, it shall quash the conviction.

Illustration.

A is convicted of an offence under Section 183 of the Indian Penal Code upon a charge which omits to state that A knew that he was directed to abstain from a certain act by an order promulgated by a public servant lawfully empowered to promulgate such order. If the Court thinks it probable that A had such knowledge, and that he was misled in his defence by the omission from the charge of the statement that he had it, it shall direct a new trial upon an amended charge; but if it appears probable from the proceedings that A had no such knowledge, it shall quash the conviction.

Amendment 40 of 1874.—For the first sentence of the illustration to Section 451, the following shall be substituted (namely):—

“A is convicted of an offence under Section 196 of the Indian Penal Code upon a charge which omits to state that he knew the evidence which he corruptly used or attempted to use as true or genuine, was false or fabricated.”

JOINDER OF CHARGES.

Separate charges for distinct offences.

452. There must be a separate charge for every distinct offence of which any person is accused, and every such charge must be tried separately except in the cases hereinafter excepted.

Illustration.

A is accused of a theft on one occasion, and of causing grievous hurt on

another occasion. A must be separately charged and separately tried for the theft, and the causing grievous hurt.

453. When a person is accused of more offences than one of the same kind committed within one year of each other, he may be charged and tried at the same time for any number of them not exceeding three.

More offences of one kind may be charged in a year.

Explanation.—Offences are said to be of the same kind under this section if they fall within the provisions of Section 455.

454. I.—If in one set of facts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with and tried for every such offence at the same time.

I.—Trial of more than one offence.

II.—If a single act falls within two separate definitions of any law in force for the time being, by which offences are defined or punished, the person who does it may be charged with each of the offences so committed, but he must not receive a more severe punishment than could be awarded, by the Court which tries him, for either.

II.—One offence falling within two definitions.

III.—If several facts, of which one or more than one would by itself constitute an offence, form, when combined, an offence under the provision of any law, in force for the time being, by which offences are defined or punished, a person who does them may be charged with every offence which he may have committed, but he must not receive for such offences, collectively, a punishment more severe than that which might have been awarded, by the Court trying him, for any one of such offences, or for the offence formed by their combination.

III.—Acts severally constituting more than one offence, but collectively coming within one definition.

Illustrations.

To paragraph I.

(a.) A rescues B, a person in lawful custody, and causes grievous hurt to C, a constable in whose custody B was. A may be separately charged with, convicted of, and punished for offences under Sections 225 and 333, Indian Penal Code.

(b.) A has in his possession several counterfeit seals with the intention of committing several forgeries. A may be separately charged with,

convicted of and punished for the possession of each seal for a distinct forgery, under Section 473, Indian Penal Code.

(c.) A, with intent to cause injury to B, institutes proceedings against him, knowing there is no just or lawful ground for such proceedings. A also falsely charges B with having committed an offence. A may be separately charged with, convicted of, and punished for two offences under Section 211, Indian Penal Code.

(d.) A, with intent to injure B, brings a false charge against him of having committed an offence. On the trial, A gives false evidence against B. A may be separately charged with, convicted of, and punished for offences under Sections 211 and 194, or 195, Indian Penal Code.

(e.) A, knowing that B, a female minor, has been kidnapped, wrongfully confines her and detains her as a slave. A may be separately charged with, convicted of, and punished for offences under Sections 368 (read with 367) and 370, Indian Penal Code.

(f.) A, with six others, commits the offence of rioting, grievous hurt, and of assaulting a public servant engaged in suppressing the riot. A may be separately charged with, convicted of, and punished for offences under Sections 147, 325, and 152, Indian Penal Code.

(g.) A criminally intimidates B, C, and D at the same time. A may be separately charged with, convicted of, and punished for each of the three offences under Section 506, Indian Penal Code.

(h.) A intentionally causes the death of three persons by upsetting a boat. A may be separately charged with, convicted of, and punished for three offences under Section 302, Indian Penal Code.

To paragraph II.

(i.) A commits mischief by cutting down a tree in a Government forest. The tree overhangs the bank of a river and falls into the stream. A commits theft by having severed the tree and by floating it down the river to his village, where he sells it. A may be separately charged with and convicted of offences under Sections 426 and 379, Indian Penal Code; but the Court which tries him may not inflict a more severe sentence than if it had convicted him under Section 379 only.

(j.) A wrongfully strikes B with a cane. A may be separately charged with and convicted of offences under Sections 352 and 323 of the Indian Penal Code; but the Court which tries him may not inflict a more severe sentence than if it had convicted him under Section 323 only.

(k.) A wrongfully kills a buffalo worth sixty rupees, belonging to B, and then takes away the carcase in a manner amounting to theft. A may be separately charged with and convicted of offence under Sections 429 and 379, Indian Penal Code; but the Court which tries him may not inflict a more severe sentence than if it had convicted him under Section 429 only.

(l.) Several stolen sacks of corn are made over to A and B, who know they are stolen property. A and B thereupon assist each other to conceal the sacks at the bottom of a grain-pit. A and B may be separately charged with and convicted of offences under Sections 411 and 414, Indian Penal Code; but the Court which tries them may not inflict a severer sentence than if it had convicted them under one of those sections only.

(m.) A uses a forged document in evidence, in order to convict B, a public servant, of an offence under Section 167. A may be separately

charged with and convicted of offences under Sections 471 (read with 466) and 196 of the Indian Penal Code; but the Court which tries him may not inflict a severer sentence than if it had convicted him under one of those sections only.

To paragraph III.

(n.) A commits housebreaking by day, with intent to commit adultery, and commits, in the house so entered, adultery with B's wife. A may be separately charged with and convicted of offences under Sections 454 and 497, Indian Penal Code; but the Court which tries him may not inflict a severer sentence than if it had convicted him under Section 497 only.

(o.) A robs B, and, in doing so, voluntarily causes hurt to him. A may be separately charged with and convicted of offences under Sections 323, 392, and 394 of the Indian Penal Code; but the Court which tries him may not inflict a severer sentence than if it had convicted him under Section 392 or 394 only.

(p.) A entices B, the wife of C, away, and then commits adultery with her. A may be separately charged with and convicted of offences under Sections 498 and 497, Indian Penal Code; but the Court which tries him may not inflict a severer sentence than if it had convicted him under Section 497 only.

455. If a single act or set of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the person accused may be charged with having committed any such offence, and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences.

Where it is doubtful what offence has been committed.

Illustration.

A is accused of an act which may amount to either theft, receiving stolen property, criminal breach of trust, or cheating. He may be charged separately with theft, criminal breach of trust, and cheating, or he may be charged with having committed either theft or criminal breach of trust, or cheating.

456. If, in the case mentioned in the last section, one charge only is brought against an accused person, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

When a person charged with one offence can be convicted of another.

Illustration.

A is charged with theft. It appears that he committed criminal breach of trust or receiving stolen goods. He may be convicted of criminal breach of trust or receiving stolen goods, though he was not charged with it.

457. When a person is charged with an offence, and part of the charge is not proved, but the part which is proved amounts to a different offence, he may be convicted of the offence which he is proved to have committed, though he was not charged with it.

When offence proved included in offence charged.

Illustrations.

(a.) A is charged under Section 407, Indian Penal Code, with criminal breach of trust in respect of property entrusted to him as a carrier. It appears that he did commit criminal breach of trust under Section 406 in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under Section 406.

(b.) A is charged with murder. He may be convicted of culpable homicide or of causing death by negligence.

458. When more persons than one are accused of the same offence, or of different offences committed in the same transaction, or when one person is accused of committing any offence, and another of abetment or attempt of such offence, they may be charged and tried together or separately as the Court thinks proper, and the provisions hereinbefore contained shall apply to all such charges.

What persons may be charged jointly.

Illustrations.

(a.) A and B are accused of the same murder. A and B may be charged and tried together for the murder.

(b.) A and B are accused of a robbery, in the course of which A commits a murder with which B has nothing to do. A and B may be tried together on a charge, charging both of them with the robbery, and A alone with the murder.

(c.) A and B are both charged with a theft, and B is charged with two other thefts committed in the course of the same transaction. A and B may be both tried together on a charge, charging both with the one theft, and B alone with the two other thefts.

In the case of *R. v. Ashruf Sheikh*, a reference was made to *Taylor on Evidence* (section 1223, vol. ii, p. 1155), and in accordance with the principle there enunciated it was laid down that, where there is no community

of interest, any one of several prisoners jointly indicted may be called as a witness for or against his co-defendants.

(379 A) 459. In trials before a Court of Session or High Court, when more charges than one are preferred against the same person, and when a conviction has been had on one or more of them, *the Government Pleader or other officer conducting the prosecution* may, with the consent of the Court, withdraw, or the Court of its own accord may suspend the inquiry into the remaining charge or charges.

Withdrawal of remaining charges on conviction on one of several charges.

Sections 452 to 459 deal with the joinder of charges; when several items of property stolen from different places are found in the house of an accused person, it is better to regard them as evidence of the offence described in Section 413, Indian Penal Code, rather than as constituting separate offences under Section 411.

The Government Pleader.—This section contains provisions similar to Section 379A, Act XXV of 1861, as amended by Act VIII of 1869. Before the passing of the latter amending Act, Government Pleaders had no power to withdraw a portion of the charge.

For the effect of the withdrawal of the charge by the public prosecutor turn back to Section 61, *ante*. This section does not refer to the heads of charge arising in the same case, but to cases where the parties are accused of several *distinct* offences, for which a separate trial is essential (13 S. W. R., 6).

PREVIOUS ACQUITTALS OR CONVICTIONS.

(55) 460. A person who has once been tried for an offence and convicted or acquitted (212) (188) of such offence, shall, *while such conviction or acquittal remains in force*, not be liable to be tried again on the same facts for the same offence, nor for any other offence, for which a different charge from the one made against him might have been made under Section 455, or for which he might have been convicted under Section 456.

Person once convicted or acquitted not to be tried for same offence.

A person, convicted or acquitted of any offence, may be afterwards tried for any offence for which a separate charge might have been made against him on the former trial under Section 454, paragraph 1.

A person acquitted or convicted of any offence in respect

of *any act* causing consequences which, together with such act, constituted a different offence from that for which such person was acquitted or convicted, may be afterwards tried for such last-mentioned offence, *if the consequences had not happened*, or were not known to the Court to have happened, at the time when he was acquitted or convicted.

A person convicted or acquitted of any offence in respect of any facts may, notwithstanding such acquittal or conviction, be subsequently charged with and tried for any other offence which he may have committed in respect of the same facts, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

Illustrations.

(a.) A is tried upon a charge of theft as a servant and acquitted. He cannot afterwards be charged upon the same facts either with theft as a servant, with theft simply, or with criminal breach of trust.

(b.) A is tried upon a charge of murder and acquitted. There is no charge of robbery; but it appears from the facts that A committed robbery at the time when the murder was committed; he may afterwards be charged with and tried for robbery.

(c.) A is tried for an assault and convicted. The person afterwards dies. A may be tried again for culpable homicide.

(d.) A is tried, under Section 270 of the Indian Penal Code, for maliciously doing an act likely to spread the infection of a disease dangerous to life, and is acquitted. The act so done afterwards causes a person permanently to lose his eyesight. A may be charged under Section 325 with voluntarily causing grievous hurt to that person.

(e.) A is charged before the Court of Session and convicted of the culpable homicide of B. A may not afterwards be tried for the murder of B on the same facts.

(f.) A is charged by a Magistrate of the first class with, and convicted by him of, voluntarily causing hurt to B. A may not afterwards be tried for voluntarily causing grievous hurt to B on the same facts, unless the case comes within paragraph 3.

(g.) A is charged by a Magistrate of the second class with, and convicted by him of, theft of property from the person of B. A may be subsequently charged with and tried for robbery on the same facts.

(h.) A, B, and C are charged by a Magistrate of the first class with, and convicted by him of, robbing D. A, B, and C may afterwards be charged with and tried for dacoity on the same facts.

This section contains the spirit of the old Section 55, Act XXV of 1861. The wording of the present section is more full than was the wording of the old section, and its meaning is made more clear by the illustrations appended to it.

While such conviction or acquittal remains in force, that is, it must not have been subsequently set aside by a Court of Appeal or Revision. *In re Kalichurn Gaegooli* it was *held* that the reversal of a conviction on the ground of misdirection to the jury was no bar to a fresh trial (7 W. R., 2); and in the case of *Muthoora Prashad* (2 W. R., 10) it was laid down that the previous conviction or acquittal must of course have been passed by a Court having jurisdiction over the offence charged. This is now clearly provided for by the last paragraph of this present section.

“*Any act.*”—These words apply equally to illegal omissions as well as acts, as, reasoning by analogy, from the wording of the Penal Code, that is, the substantive law, words referring to acts done are extended also to illegal omissions.

If the consequences had not happened.—The wording of Section 55, Act XXV of 1861, was as follows:—“Provided that any person may be tried for the offence of culpable homicide and punished for that offence, notwithstanding he may have been tried and punished for the act which caused the death, if at the time of the conviction for the said act death shall not have resulted, or shall not have been known by the Court which passed sentence to have resulted.” The law in England is similar to this; there an indictment for murder or manslaughter will lie where the death of the deceased results within the year and day from the assault for which the party committing it had already been summarily punished by Justices of the Peace; e.g., the Act 24 & 25 Vic., c. 100, s. 45, only relieves the party punished by the Magistrates from any further liability for the same cause. Hence an indictment for felonious stabbing will not lie (*R. v. Walker*, 2 M. & Rob., 446), or for unlawfully wounding and an assault doing actual bodily harm (*R. v. Elrington*, 1 B. & S., 688). For each of those is for the same cause as that investigated by the Justices of the Peace, and they are also to determine whether the assault was accompanied by any felonious transaction, and their decision on that point is final. But if the death of the assaulted party supervene, a new element is introduced which was not before the Justices, and an indictment for murder or manslaughter is not for the same cause, and it will therefore lie. So it was decided in the *Queen v. Morris*, L. R., 1 C. C., 90.

With reference to the maxim, *nemo debet bis vexari pro una et eadem causa*, Broom, in his “Legal Maxims,” at pp. 240 to 243, has the following remarks:—“An important application of this general principle occurs in Criminal Law, for there it is a well established rule, that when a man has once been indicted for an offence, and acquitted, he cannot afterwards be indicted for the same offence: Provided the first indictment were such that he could have been lawfully convicted upon it by proof of the facts contained in the second indictment; and if he be thus indicted a second time he may plead *autrefois acquit*, and it will be a good bar to the indictment. Thus, an acquittal upon an indictment for murder may be pleaded in bar of another indictment for manslaughter; and an acquittal upon an indictment for burglary and larceny may be pleaded to an indictment for the larceny of the same goods; because in either of these cases the prisoner might, on the former trial, have been convicted of the offence charged against him in the second indictment; the true test by which to decide whether a plea of *autrefois acquit* is a sufficient bar in any particular case being, whether the evidence necessary to support the second indict-

ment would have been sufficient to procure a legal conviction upon the first. On the principle that a man should not twice be put in jeopardy for one and the same offence," a plea of *autrefois convict* will operate to bar a second indictment, unless the judgment on the former has been reversed for error. It may, however, be laid down generally that where, "by reason of some defect in the record, either in the indictment, place of trial, process, or the like, the prisoner was not lawfully liable to suffer judgment for the offence charged on that proceeding," he cannot, after reversal of the judgment, properly be said to have been "in jeopardy" within the meaning of this maxim. So, where on a trial for misdemeanour, the jury are improperly, and against the will of the defendant, discharged from giving a verdict after the trial has begun, this is not equivalent to an acquittal.

When a man is indicted for an offence and acquitted, he cannot afterwards be indicted for the same offence, provided the first indictment were such that he could have been lawfully convicted on it; and if he be thus indicted a second time he may plead *autrefois acquit*, and it will be a good bar to the indictment. The true test by which the question, whether such a plea is sufficient bar in any particular case, may be tried is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first—this is the law in England as gathered from several reported cases (*vide Arch.*, 131). The proof of the issue lies on the defendant.

The same rules apply generally to the plea of *autrefois convict*.

With reference to the case of *R. v. Dwarkinath Dutt*, Peacock, Chief Justice, in delivering his opinion, said:—"In England it is necessary that the crime charged be precisely the same as that of which the prisoner was acquitted, and so strictly does the rule prevail, that it was held by all the Judges that an acquittal upon a trial for burglariously breaking and entering a dwelling-house, and stealing goods therein, was no bar to a subsequent indictment for burglariously breaking and entering the dwelling-house with intent to steal the goods, though both charges related to the same breaking and entering. The Judges remarked that, if the crimes were so distinct that evidence of the one would not support the other, it would be as inconsistent with reason as it would be repugnant to the rules of law, to say that the offences were so far the same that an acquittal of the one would be a bar to a prosecution for the other. The question in these cases is whether the prisoner could have been convicted on the first trial of the offence charged on the second trial, and whether he was ever in jeopardy for that offence. In *Vaux's case* (4 Coke's Report, 44) it was held that where a former acquittal or conviction is spoken of as a good plea, a lawful acquittal or conviction is intended; and that if the former indictment was not sufficient, the acquittal or conviction would not be a lawful one. When it is said that the offences must be the same, it is merely meant that they must be in reality the same; and therefore a defendant may plead his previous acquittal, though the two charges differ in immaterial circumstances; for it would be absurd to suppose that, by varying the day, place, or any other allegation, the precise accuracy of which is not material, the prosecutor could change the rights of the defendant, and subject him to a second trial for what in reality was the same offence. Thus, if a prisoner be indicted for murder alleged to have been committed

on a certain day, and acquitted, and afterwards be charged with killing the same person on a different day, he may plead the former acquittal in bar, notwithstanding this difference, for the day stated in the indictment on the former trial was not material. (See Chitty's Criminal Law, vol. i, p. 452, and the case there cited.)

"The following are instances of cases in which the offences have been held to be different. It is laid down in Hale's 'Pleas of the Crown' that if A commit a burglary, and at the same time steals goods out of a house, and he be indicted for stealing the goods, and acquitted, he may be afterwards indicted for the burglary, notwithstanding the acquittal; and, *converso*, if indicted for the burglary, and acquitted, yet he may be indicted for the larceny; for they are several offences, though committed at the same time; and burglary may be where there is no larceny, and larceny may be where there is no burglary. So it has happened that a man acquitted for stealing a horse has yet been arraigned and convicted for stealing the saddle, though both were done at the same time" (Hale's 'Pleas of the Crown,' vol. ii, p. 245). In this case it was laid down that, whenever the offences charged in the two indictments are capable of being identified as the same offence, it is a question of *fact* whether the offences are the same, and the identity must be proved; but, where a plea of *autrefois acquit* upon its face shows that the offences are legally distinct and incapable of identification, the Court may determine the question as a matter of *law*.

CHAPTER XXXIV.

OF THE JUDGMENT ORDER AND SENTENCE.

This chapter contains the provisions of Section 381, Chapter XXVI of 1861, and three new sections regarding "when judgment is to be pronounced, in what language it is to be written, and what it is to contain."

In this chapter the matters which the finding must necessarily contain are stated, but it is left to the Courts to adopt the form in which those matters shall be expressed.

Sentences should be recorded in accordance with the following rules:—

1st. When *all* the facts in evidence form portion of *one* entire offence, a verdict should be entered up, and sentence passed, for that offence only; and though a portion of the *same facts* would, if they stood alone, constitute a second offence, a verdict of "not guilty" should be entered up on any separate charge for the minor offence.

2nd. For instance, when the chief offence charged and proved by the evidence is theft, the fact of the stolen property being found in the possession of the offender should be considered as a portion of the evidence by which the chief offence is proved; and a verdict of "not guilty" should be entered up on the charge of dishonestly receiving or retaining such property.

3rd. If a portion of the facts in evidence constitute *one* offence, and another and *distinct* portion constitute a *second separate and distinct offence* under the Penal Code, a verdict on each charge should be entered up and a substantial sentence passed on the principal offence, the punishment not exceeding that which may by law be inflicted for the gravest offence (125 J. C. O., Pref.).

(381) 461. When the trial in any Criminal Court is concluded, the Court, in passing judgment, if the accused person be convicted, shall distinctly specify the offence of which, and the section of the Indian Penal Code *or other law* under which, he is convicted :

Judgment to specify offence.

Or if it be doubtful under which of two sections, or under which of two parts of the same section, such offence falls, the Court shall distinctly express the same, and pass judgment in the alternative, according to Section 72 of the said Code.

Judgment in the alternative.

If it be doubtful under which, &c.—The power to pass judgment in the alternative given by this section as it originally stood applied to cases in which it was doubtful under which of two sections the offence fell, and not to cases in which both charges were under the same section ; but the provisions of this section have been extended to doubtful cases falling under different parts of the *same* section, and the words *or other law* have been added to this section by the present enactment, Act X of 1872.

In the alternative.—An alternative finding under this section should not be resorted to until both the committing officer and the S. J. are satisfied that no reliable evidence is procurable in support of one or other of the charges ; and such a finding cannot be based, in a case of giving false evidence, upon two statements which are not absolutely contradictory the one of the other, nor when in one of them the accused gives only hearsay evidence ; every presumption in favour of the possible reconciliation of the statements must be made (12 W. R., 11).

Section 72, Penal Code, declares that in the case mentioned in this section, “ the offender shall be punished for the offence for which the lowest punishment is provided, if the same punishment be not provided for all.”

There is no review of a judgment passed by a Criminal Court ; but if before judgment is recorded the Court ascertain that there is an error or mistake in the judgment, the Court may correct such error or mistake : it can correct clerical errors in judgments after they have been recorded (5 W. R., 61). In passing sentence on a Police Officer, the Court should not order his dismissal, since such forms no part of a judicial sentence, being an executive order (5 W. R., 4).

462. In trials with assessors, when the exhibits have been perused, the witnesses examined, and the parties heard in person or by their respective pleaders, the Court shall pronounce its judgment. The judgment shall be pronounced in open Court either immediately or on some future day,

When judgment is to be pronounced.

of which due notice shall be given to the parties or their pleaders.

This section has been added to the C. C. P. by the present enactment, Act X of 1872, and lays down clearly when the judgment of the Court is to be pronounced. In trials with assessors, the fact of a Judge omitting to state the grounds for his finding does not *per se* invalidate the conviction (8 Bo. H. C. R., 55).

(429) 463. The judgment or final order shall be written by the Presiding Officer of the Court in English or the language of the district.

If the language of the Judge be not English, the judgment shall not be written in English, unless the Judge be sufficiently conversant with the English language to be able to write a clear and intelligible decision in that language.

Proviso.

The High Courts had issued certain rulings, laying down in what language the judgment should be written and what it should contain. These and all other similar rulings are now superseded by the clear text of the law.

(429) 464. The judgment or final order shall contain the point or points for determination, the finding thereupon, and the reasons for the finding, and shall be dated and signed by the Judge in open Court at the time of pronouncing it. When a judgment or final order has been so signed, it cannot be altered or reviewed by the Court which gives such judgment or order. It shall specify the offence of which the accused person is convicted, and the punishment to which he is sentenced, or, if it be a finding of acquittal, it shall direct that he be set at liberty.

The judgment or order shall be explained to the accused persons or person affected by it; and a copy shall be given him in his own language as soon as possible, and the original shall be filed with the record of proceedings, and a translation thereof, where the original is recorded in a different language from that in ordinary use in the district, shall be incorporated in the record of the case.

In trials by jury the Court need not state its reasons for its judgment, but shall record the heads of the charge to the jury.

If the Judge differ from the jury and determine to submit

the case to the High Court, he shall record the grounds of his opinion.

Nothing herein contained shall prevent any Court from recalling any order other than a final order.

No error or defect in any judgment shall invalidate the proceedings.

Amendment 41 of 1874.—For the second paragraph of Section 464, the following shall be substituted (namely):—

“The judgment or order shall be explained to the accused person or persons affected by it, and on his application a copy thereof shall be given to him without delay free of cost and in his own language, if practicable; if not, in the language of the Court.”

And to the seventh paragraph of the same section, the following words shall be added (namely):—

“where such error or defect is in a matter not affecting the merits of the case.”

Section 464 required that a copy of the judgment or order should be given to every accused person in his own language as soon as possible. The amended section provides that a copy of the judgment or order is to be given only on the application of the accused, but adds that it is to be given without delay, free of cost; and in his own language if possible, if not, in the language of the Court. The term “free of cost” does not exempt the applicant from the payment of Court fees, if the copy is required for the purpose of being “filed, exhibited, or recorded in any court of justice, or before any public officer.” If required for appeal Court fees are exempted by Government notification No. 996 of 6th June, 1873. For Section 276 may now be read as Section 464, C. C. P.

“The modern administrator of justice,” Maine tells us, “has confessedly one of his hardest tasks before him when he undertakes to discriminate between the degrees of criminality which belong to offences falling within the same technical description. It is always easy to say that a man is guilty of manslaughter, larceny, or bigamy, but it is often most difficult to pronounce what extent of moral guilt he has incurred, and consequently what measure of punishment he has deserved. There is hardly any perplexity of casuistry, or in the analysis of motive, which we may not be called upon to confront if we attempt to settle such a point with precision; and, accordingly, the law of our day shows an increasing tendency to abstain as much as possible from laying down positive rules on the subject. In France, the jury is left to decide whether the offence which it finds committed has been attended by extenuating circumstances; in England a nearly unbounded latitude in the selection of punishments is now allowed to the Judges. It is curious to observe how completely men of primitive times were persuaded that the impulse of the injured person was the proper measure of the vengeance he was entitled to exact, and how literally they imitated the probable rise and fall of his passions in fixing their scale of punishment.” A judgment once delivered becomes the property of the profession and the public.

A judgment or final order pronounced and signed in accordance with the requirements of this section, cannot be altered or revised by the Court which gives such judgment or order. If alteration is necessary, the proper course is to apply to the High Court under Section 296, *ante*.

CHAPTER XXXV.

PROSECUTIONS IN CERTAIN CASES.

This chapter contains the provisions of Chapter XI, Act XXV of 1861. Where any important alterations have been made, they are commented on under the sections to which they refer.

With a view to avoid miscarriages of justice, provision has been made, that a sanction for a prosecution, under any specified section, shall cover a prosecution for the same facts under any other section.

In the several sections of this chapter, the term *complaint* has been substituted for the term *charge*, as rendered formerly.

Around persons clothed with an official character is cast by the customary law of England a peculiar protection, on grounds of political expediency; whether the alleged liability arise out of contract or out of tort. On principles of public policy an action will not lie against a person acting in a public character and situation, at the instance of any person who might suppose himself aggrieved. As regards the liability of a public servant *ex delicto*, it is clear that for an act *per se* wrongful and injurious to another, for an injury in the strict legal sense of that term, he will be liable. Even where the Government may be irresponsible, it by no means follows that the agent is likewise so; special circumstances may render even a public servant personally responsible for acts done *bond fide* by him on behalf of the public which, in contemplation of law, injuriously affect another (B. C. L., 620).

(166) 465. A complaint of an offence punishable under Chapter VI of the Indian Penal Code, except Section 127, or punishable under Section 294 A of the said Code, shall not be entertained by any Court, unless the prosecution be instituted by order of, or under authority from, the Governor-General of India in Council, or the Local Government, or some officer empowered by the Governor-General in Council to order or authorize such prosecution, or unless instituted by the Advocate-General.

(167) 466. *A complaint of an offence committed by a public servant in his capacity as such public servant, of which any Judge or any public servant not removable from his office without the sanction of the Government is accused as such Judge or public servant, shall not be entertained against such Judge or public servant, except with the sanction or under the direction of the Local Government, or of some officer empowered by the Local Government, or of some Court or other authority to which such Judge or public servant is*

subordinate, and whose power so to sanction or direct such prosecution the Local Government shall not think fit to limit or reserve.

No such Judge or public servant shall be prosecuted for any act purporting to be done by him in the discharge of his duty unless with the sanction of Government.

Sanction when to be given. The sanction must be given before the commencement of the proceedings.

Power of Local Government. The Local Government may limit the person by whom, and the manner in which the prosecution is to be conducted, and may specify the Court before which the trial is to be held.

Amendment 42 of 1874.—To Section 466, the following clause shall be added (namely) :—

“In this section the expressions ‘Judge’ and ‘public servant’ shall be taken to have the meaning assigned to them respectively by the Indian Penal Code.”

This section contains the provisions of Section 167, Act XXV of 1861. The words “in his capacity as such public servant” have been added to the text of the Code by the present enactment, and paragraphs two, three, and four have been added to this section.

The old section did not say that Government must give the power, but merely that it shall exist, unless limited or reserved.

A complaint.—The report or application of the public servant or Court shall be deemed sufficient complaint. (Explanation to Section 470, *post*.)

In his capacity as such public servant.—In 7 Bo. H. C. R., 61, the Bombay High Court held that charges under this section may relate to offences other than those contained in Chapter IX, P. C., namely to offences in Chapter XI, Sections 217 to 233, P. C., and that this Section 466 relates *only* to offences under the Penal Code *when committed by a public servant*, whereas the C. H. C. limited the protection herein given to offences specified in Chapter IX, P. C. The present law has accepted the Bombay view. Offences committed against the person or property of individuals, by one who happens to be a public servant, are not necessarily committed by him as such public servant in the sense in which those words are used in P. C., and unless committed in that character, must be regarded as the acts of individuals in their private capacity. Charges founded on such acts do not need sanction of Government, but should be dealt with in the same way as charges against individuals ordinarily are (H. C., Calcutta, Cir. 20, October, 1864). The words “not removable from his office without the sanction of the Government” have been held to refer *only* to public servants.

(168) 467. A complaint (Section 470, *post*, *Explanation*)

Prosecution for con-
tempt of the lawful
authority of public
servants.

of any offence described in Chapter X of the Indian Penal Code, not falling within Section 435 or 436 of this Act, shall not be entertained in any Criminal Court, except *with the sanction* or on the complaint of the public servant concerned, or of his official superior.

The prohibition contained in this section shall not apply to the offences described in Sections 189 and 190 of the Indian Penal Code.

With the sanction.—The term sanction, as used in these sections, does not contemplate an application for sanction on the part of the Magistrate also. A Civil Court, before sanctioning investigation, must satisfy itself that there is ground for making an investigation into a charge (N. A., N. W. P., 1862).

The sanction here referred to may be expressed in general terms, and need not name the accused person, and may be given at any time (Section 470, *post*).

A charge of contempt of Court for not responding to a civil summons under this section and Section 114, I. P. C., is not sustainable, unless service of notice, under Sections 155, 156, Act VIII of 1859, is legally proved.

A person committing an offence under Chapter X, P. C., is viewed by the law, not personally in regard to the injured party, but to him as a representative of the public, and this is why discretion is given to the head of the department to prosecute or not. The person injured can, nevertheless, have his remedy by an action for damages, should no criminal prosecution be sanctioned (9 W. R., 31).

(169) 468. A complaint (Section 470, *post*, *Explanation*) of an offence against public justice, described in Sections 193, 194, 195, 196, 200, 205, 206, 207, 208, 209, 210, 211, or 228 of the Indian Penal Code, when such offence is committed before or against a Civil or Criminal Court, shall not be entertained in the Criminal Courts except *with the sanction of the Court* before or against which the offence was committed, or of some other Court to which such Court is subordinate.

Prosecution for cer-
tain offences against
public justice.

With the sanction of the Court.—In the case of a prosecution instituted under sanction of a Civil Court, the prisoner can only be committed under a section sanctioned by the Court.

When a person makes one statement before the Magistrate and a directly different statement before the Civil Court, he may be legally committed by the Magistrate on an alternative charge, provided the consent of the Civil Court has been obtained under this section to the institution

of the charge connected with the statement made in that Court (Cr. R., 8 W. R., p. 79).

The sanction accorded by a Civil Court under this section in a case under Section 193, P. C., need not be more specific than a general sanction to prosecute for any false statement contained in the two depositions given. (See note on Section 193, P. C., 11 W. R., Cr. R., p. 17.)

The sanction referred to in this Section 468 may be expressed in general terms, and need not name the accused person, and may be given at any time (Section 470, *post*).

This Section 468 enhances the powers conferred on Civil Courts by Act XXIII of 1861, which law provides for such offences as those mentioned in this section, with the exception of offence under Sections 211 and 228, I. P. C., when committed in any case pending before the Civil Courts.

(170) 469. A complaint (Section 470, *post*, *Explanation*) of an offence relating to documents described in Section 463, 471, 475, or 476 of the Indian Penal Code, when the document has been given in evidence in any proceedings in any Civil or Criminal Court, shall not be entertained against a party to such proceedings, *except with the sanction of the Court in which the document was given in evidence*, or of some other Court to which such Court is subordinate.

Prosecution for certain offences relating to documents given in evidence.

Except with the sanction of the Court, &c.—The object of this section is properly not mere matter of procedure, but to throw a certain degree of protection over the person charged with the particular offence there mentioned. The Court merely sanctions, the initiative lies with the party interested in the civil proceedings (11 S. W. R., 171).

Under the provisions of the following section, *the sanction* herein referred to may be expressed in general terms, and need not name the accused person, and may be given at any time.

470. The sanction referred to in Sections 467, 468, and 469 may be expressed in general terms, and need not name the accused person.

Nature of sanction necessary.

Such sanction may be given *at any time*, and a sanction under any one of the three last preceding sections shall be deemed sufficient authority for the Court to amend the charge to one of an offence coming within either of the two remaining sections, if the facts disclose such offence.

Explanation.—In cases under this chapter, the report or

and the Court may, if it thinks fit, order that the case be referred to a Magistrate for inquiry.

The Court may, if it thinks fit, order that the case be referred to a Magistrate for inquiry, and may, if it thinks fit, order that the case be referred to a Magistrate for inquiry, and may, if it thinks fit, order that the case be referred to a Magistrate for inquiry.

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The Magistrate receiving the case may, if he is authorized to make transfers of cases, transfer the inquiry to some other competent Magistrate instead of completing the inquiry himself.

This section contains the provisions of the old Section 171 C. C. P. the words, "may order inquiry to be made and may, if it thinks fit, order that the case be referred to a Magistrate for inquiry," have been added to the text by the new C. C. P. Act, thereby clearing the ambiguity of the working of the old section, for the original section admitted of two readings, by some the words "may send the case for investigation to any Magistrate having power to try or commit for trial" were read as though the Court after making the preliminary inquiry, might send the case, or might drop the whole business; by others, the words were construed as though the Court might send the case to another Magistrate, or might try it itself and commit to Court of Sessions. The matter is now clear, and all doubts on this point set at rest by the addition made to the present section. The Court should specify the Magistrate to whom the case is sent.

The last paragraph of this section is also an addition to the text of the C. C. P., and the words *trial and inquiry* substituted for the term *investigation*.

Is of opinion that there is sufficient ground for inquiring into any charge, &c.—From the words “inquiring into any charge” it is evident that the initiative in a case under this section is to be taken by the party interested, and not by the Court, as contemplated by the preceding sections (see 11 W. R., 171).

Such preliminary inquiry.—The investigation herein alluded to may be an *ex parte* one (5 R. C. C. R., p. 19). Not being judicial, not necessary that it should be on oath (J. C. Punjab, 1610, dated 1st April, 1862); but on receiving such a case, Magistrates should commence it *de novo* (*id.*). If the Court proceeds under Section 474, it must itself hold a complete preliminary inquiry, frame a charge, and take all depositions (5 R. C. C. R., p. 19).

When an offence has been committed before a Civil Court, and it appears to the presiding Judge that the charge falls under two or more heads, all of which are triable by the Sessions Court exclusively, the Civil Court shall proceed under this section, rather than under Section 474 (Cir. No. 27, H. C. Calcutta, 1866; J. C., Oudh, Cir. No. 33, 1866).

(172) 472. A Court of Session may charge a person for any *such offence committed before it, or under its own cognizance*, if the offence be triable by the Court of Session exclusively, and may commit or hold to bail and try him upon its own charge.

Power of Court of Session as to such offences committed before itself.

In such case the Court of Session shall have the same power of summoning and causing the attendance at the trial of any witnesses for the prosecution or for the defence as is vested in a Magistrate by this Act.

Such Court may direct the Magistrate to cause the attendance of such witnesses on the trial.

Such offence committed before it, or under its own cognizance.—In a case of giving false evidence by making contradictory statements, a S. J. cannot, without making further inquiry, commit a person for trial under this section, when both contradictory statements are not made before it. By the words “under its own cognizance,” it is meant to provide for a case where it is brought under the notice of the Court of Session in the course of a judicial proceeding that the crime with which the party is to be charged has been committed by him (12 W. R., 69).

In re Queen v. Mukta Sing, the prisoner gave evidence on the trial of one Gaurkishor; Mr. Cockburn, the Judge, having discovered the evidence to be false, made a complaint against the prisoner before the Magistrate, and was examined by him as a witness. The Magistrate committed the prisoner for trial under Section 193, I. P. C. The case came on before (S. J.) Cockburn. On the trial in the S. C., Mr. Cockburn was himself sworn and gave evidence as a witness, and put in and proved the depositions taken before him. *Held*, that he was a competent witness, and could give evidence in a case being tried before himself, even though he laid

application of the public servant or Court shall be deemed sufficient complaint.

This section has been added to the C. C. P. by the present enactment, and contains the gist of many rulings on the subject which are superseded, and, by the clear wording of the text of the Code, embodied in this section.

"*At any time.*"—These words mean, "a time which does not unduly prejudice the party to be prosecuted, or put him in a worse position than he was before (18 S. W. R., 62). No appeal lies against an order sanctioning a prosecution.

(171) 471. When any Court, Civil or Criminal, is of opinion that there is sufficient ground *for* *inquiring into any charge mentioned in* Procedure in cases mentioned in Sections 467, 468, and 469. Sections 467, 468, and 469, such Court, after making *such preliminary inquiry* as may be necessary, *may either commit the case itself, or* may send the case for inquiry to any Magistrate having power to try or commit for trial the accused person for the offence charged.

Such Magistrate shall thereupon proceed according to law, and the Court may send the accused person in custody, or take sufficient bail for his appearance before such Magistrate, and may bind over any person to appear and give evidence on such *trial or inquiry*.

The Magistrate receiving the case may, if he is authorized to make transfers of cases, transfer the inquiry to some other competent Magistrate, instead of completing the inquiry himself.

This section contains the provisions of the old Section 171, C. C. P.; the words, "*may either commit the case itself or,*" in italics, have been added to the text by the new C. C. P. Act, thereby clearing the ambiguity of the wording of the old section, for the original section admitted of two readings; by some, the words "may send the case for investigation to any Magistrate having power to try or commit for trial," were read as though the Court, after making the preliminary inquiry, might send the case, or might drop the whole business; by others, the words were construed as though the Court might send the case to another Magistrate, or might try it itself and commit to Court of Sessions. The matter is now clear, and all doubts on this point set at rest by the addition made to the present section. The Court should specify the Magistrate to whom the case is sent.

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(172) 472. A Court of Session may charge a person for any *such offence committed before it, or under its own cognizance*, if the offence be triable by the Court of Session exclusively, and may commit or hold to bail and try him upon its own charge.

Power of Court of Session as to such offences committed before itself.

In such case the Court of Session shall have the same power of summoning and causing the attendance at the trial of any witnesses for the prosecution or for the defence as is vested in a Magistrate by this Act.

Such Court may direct the Magistrate to cause the attendance of such witnesses on the trial.

Such offence committed before it, or under its own cognizance.—In a case of giving false evidence by making contradictory statements, a S. J. cannot, without making further inquiry, commit a person for trial under this section, when both contradictory statements are not made before it. By the words “under its own cognizance,” it is meant to provide for a case where it is brought under the notice of the Court of Session in the course of a judicial proceeding that the crime with which the party is to be charged has been committed by him (12 W. R., 69).

In re Queen v. Mukta Sing, the prisoner gave evidence on the trial of one Gaurkishor; Mr. Cockburn, the Judge, having discovered the evidence to be false, made a complaint against the prisoner before the Magistrate, and was examined by him as a witness. The Magistrate committed the prisoner for trial under Section 193, I. P. C. The case came on before (S. J.) Cockburn. On the trial in the S. C., Mr. Cockburn was himself sworn and gave evidence as a witness, and put in and proved the depositions taken before him. *Held*, that he was a competent witness, and could give evidence in a case being tried before himself, even though he laid

the complaint, acting as a public officer ; provided that he had no personal or pecuniary interest in the subject of the charge ; and he is not precluded thereby from dealing judicially with the evidence of which his own forms a part (B. L. R., vol. iv, p. 15).

The power of commitment conferred on a Court of Sessions by this section is confined to offences committed before itself. Where a person is charged with making two contradictory statements, it must be proved by direct evidence that both statements were made, and there must be an inquiry as to which statement is untrue, and whether the accused wilfully made the statement which is supposed to be false, knowing it to be false (12 W. R., p. 31).

473. Except as provided in Sections 435, 436, and 472, no Court shall try any person for an offence committed in contempt of its own authority.

Offences in contempt of Court how to be disposed of.

(173) 474. In any case triable by the Court of Session exclusively, any Civil Court, before which such offence was committed, may, instead of sending the case for inquiry to a Magistrate, complete the inquiry itself, and commit or hold to bail the accused person to take his trial before the Court of Session.

Power of Civil Courts to complete investigation and commit to Court of Session.

For the purposes of an inquiry under this section, the Civil Court may exercise all the powers of a Magistrate ; and its proceedings in such inquiry shall be deemed to have been held by a Magistrate.

If a Civil Court sends a case for inquiry and commitment to a Magistrate, he is bound to receive and dispose of it ; but if a Civil Court makes a commitment, it shall complete the inquiry itself.

Under the original section as it stood in Act XXV of 1861, Civil Courts could not issue warrants for absconding offenders. Section 4, Act VIII of 1869, rectified this omission. The present section has substituted the term *inquiry* for the old term *investigation*. A collector, acting under Act X of 1859, is a Civil Court within the meaning of this section (1 W. R., 47).

Under this section, in any case triable by the Court of Session exclusively, any Civil Court may complete the investigation and commit itself. And, under Section 477, if any such offence triable by the Court of Session exclusively be committed before a Magistrate not competent to commit for trial, he shall send the case to another Magistrate who is. From this it would seem to follow that if such an offence be committed before a Magistrate who is competent to commit, he may do so. But on no account can

either a Magistrate or a Civil Judge himself deal with such an offence which is *not cognizable by the Court of Session exclusively*.

(174) 475. When any such commitment is made by order of a Civil Court, the Court shall frame a charge in the manner hereinbefore provided, and shall send the same with the order of commitment and the record of the case to the Magistrate of the District or other Magistrate of the first class, and such Magistrate shall bring the case before the Court of Session, together with the witness for the prosecution and defence.

Procedure in Civil Court in such cases.

(Compare with Section 18, Act XXIII of 1861.)

There is a great difference in the powers of a Magistrate, according to the manner in which a case is treated by the Civil Court. If a Civil Court commit a person directly for trial, the Magistrate acts merely as a ministerial officer, and produces all parties and witnesses, and the record, before the Judge at the time of trial, and can do nothing more. If the case be sent for investigation, he acts as a judicial officer, inquires into the truth or falsehood of the charge, and, in the event of the evidence being sufficient, is at liberty to discharge the accused, or if other people are found to be concerned in the same offence, he can bring them to trial, and frame the charge accordingly (3 W. R. C. L., 1).

(175) 476. Whenever any Court of Session or Civil Court commits or holds to bail any person for trial under Sections 472, 474, or 475, it may also bind over any person to give evidence, and *for that purpose* may exercise all the powers of a Magistrate.

Court may exercise all powers of Magistrate as to binding over persons to give evidence.

For that purpose.—The words “for that purpose” refer only to binding witnesses to give evidence; on any other supposition, power of summoning witnesses would appear to have been conferred on a S. C. twice over, *viz.*, by Sections 472 and 476 (No. 491, June 19th, 1866, H. C., Calcutta).

(176) 477. If any such offence, triable by the Court of Session exclusively, be committed before a Magistrate not empowered to commit for trial before a Court of Session, he shall send the case to a Magistrate competent to make such commitment, who shall proceed to pass such order in the case as he thinks fit.

Procedure where offence triable only by Session Court is committed before Magistrate not empowered to commit to such Court.

(177) 478. A complaint of an offence under Section 497 of the Indian Penal Code shall not be instituted except by the husband of the woman, *or by any person under whose care she was living* at the time when the adultery was committed.

Prosecution for adultery.

The Criminal Court may accede to the application of the prosecutor to withdraw a charge of adultery. The production of marriage certificate, or other satisfactory evidence of the marriage, is strictly required in indictment of adultery (Letter No. 1144, 15th December, 1865, vol. i, p. 3, R. C. C. R.).

Vide notes on Section 497, P. C. The J. C. C. P. has ruled that a minor can act under this section with the aid of nearest relative.

Or by any person, &c.—As the law originally stood, no one but the husband of the woman could institute a complaint under Section 497. I know by some it is imagined that the alteration now made in the law will cause no small scandal. In this fear I do not myself share. There can be little harm in allowing a person having charge of a female, a person under whose care she is living, to institute a charge against a man for adultery under Section 497, I. P. C. This power is given in the following Section 479, C. C. P.

There is practically very little difference between these two offences. In both instances the female is willing. In the former the man has intercourse with the woman inside her guardian's house, or perhaps in his field just outside his house; in the latter, he and the woman walk off together to the adulterer's abode, or go off together to some fair; the only other difference is that Section 498, I. P. C., applies to one female enticing away another for the purpose that the enticed one may have sexual intercourse with some man who is not her husband.

A goes to Hyderabad, leaving his wife B at Fyzabad, under the care of his parents, C and D. E gets into her good graces, and they get into the habit of illicitly copulating. A's direction is not known. C and D cannot write or read. A may be away two or three years. C and D are cut by all their neighbours, and E and A go on shamelessly enjoying their carnal intercourse, and the law provided no remedy; whereas, if A only went off with E instead of having connection with him in her parents' house, they could prosecute E under Section 498, I. P. C. It is well known that where a man leaves his home for service, he leaves his wife, as a rule, with his own parents, or hers, and they are looked upon as her guardians, standing in the place of her absent lord, and she might be enticed to dishonour and disgrace, and the law gave her guardians no power to bring the enticer to justice. If adultery is to be punishable under the Penal Code, why deprive a large portion of the community from taking advantage of Section 497 by the provisions of the old Section 177, C. C. P.? Why should not C or D, during the long and unavoidable absence of A, be allowed to bring a charge against E? Why should the bad results of continued adultery be allowed to continue unchecked, awaiting the arrival of A? This is a procedure impossible for the natives

to understand. As a people they appear, from the highest rajah to the lowest coolie, to be by nature most keenly sensitive of connubial dishonour, and the alteration made in this section cannot but be appreciated by them.

The object of this section is that a specific charge of adultery shall be laid by the husband, or person having the care of the married woman. It is not sufficient that such husband or person should institute a charge of some other offence than adultery, and incidentally, during the hearing of the case, urge that the woman is living in adultery with the person charged. The Court has not the power of amending the charge as laid and converting it into one of adultery, nor has it the power of adding a charge under Section 497, Penal Code, to the specific charge made by the person authorized to prefer a charge.

(178) 479. A complaint of an offence under Section 498 of the Indian Penal Code shall not be instituted, except by the husband of the woman or by the person having care of such woman on behalf of her husband.

Prosecution for enticing away a married woman.

It was ruled by the J. C. C. P. in 1862 to be immaterial whether the woman is an adult or a minor. (*Vide* notes on Section 498, P. C.)

In charges of "adultery" and "enticing away a married woman," a specific charge must be laid; it is not sufficient that the husband institute a charge of enticing or taking away, and incidentally, during the hearing of the case, urge that his wife is living in adultery with the person charged. The Court has not the power of amending the charge as laid and converting it into one of adultery, nor has it the power of adding a charge to the specific charge made by the husband of the woman. (*Vide* notes under Sections 497, 498, I. P. C.)

PART XI.

PREVENTIVE JURISDICTION OF MAGISTRATES.

CHAPTER XXXVI.

OF THE DISPERSION OF UNLAWFUL ASSEMBLIES.

Amendment 43 of 1874.—Chapter XXXVI (*Of the Dispersion of unlawful Assemblies*) shall be deemed to apply to the towns of Calcutta, Madras, and Bombay, and the word “Magistrate,” wherever it occurs in the said chapter, shall be deemed to include a Magistrate of Police.

(III) 480. Any Magistrate or officer in charge of a Assembly to dis-
perse on command of
Magistrate or Police
Officer. Police-station may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse, and it shall thereupon be the duty of the members of such assembly to disperse accordingly.

The following remarks were made by Mr. Stephen, in his speech introducing the Report of the Select Committee on the C. C. P. Bill :—This chapter sets out in plain terms what is now the law (as I believe, though it is nowhere written down) as to the dispersion of unlawful assemblies by military force. It has often appeared to me to be a great hardship on military men that there should be no express written law, laying down in precise terms their duty in relation to the dispersion of unlawful assemblies. The Queen’s Regulations contain provisions on the subject; but they are not law; at least they have not, as regards Civil Courts in England, the force of law. Various celebrated judgments have laid down the principles of the matter very clearly, but military officers can hardly be expected to be acquainted with the Law Reports. The results of the want of clear precise knowledge on this subject have often been deplorable. Thus, for instance, in the Gordon riots in 1780, London was at the mercy of a mob for two days, because no one chose to give orders or take responsibility as to the employment of the military. At the Bristol riots, fifty years later, a great part of the town was burnt to the ground, because an officer in command of a dragoon regiment did not know that it was his duty to order his men to charge when the town was burning, and there was no Magistrate to give him orders; and I have been told of several instances in which similar evils have occurred in India. In order to show that what is enacted in this Bill is no invention of mine, but merely a statement, with but very slight additions, of the law on this important subject which has long existed in England, I will, with your Lordships’ permission, read the statement of the law made by Lord Chief Justice Tindal, in his charge to

the Grand Jury of Bristol, at a Special Commission held in 1832 after the riots :—

“ By the common law, every private person may lawfully endeavour, of his own authority, and without any warrant or sanction of the Magistrate, to suppress a riot by every means in his power. He may disperse, or assist in dispersing, those who are assembled ; he may stay those who are engaged in it from executing their purpose ; he may stop and prevent others whom he shall see coming up from joining the rest ; and not only has he the authority, but it is *his bounden duty* as a good subject of the King, to perform this to *the utmost of his ability*. If the riot be general and dangerous, he may arm himself against the evil-doers to keep the peace.

“ It would undoubtedly be more prudent to attend and be assistant to the Justices, Sheriffs, or other ministers of the King in doing this, for the presence and authority of the Magistrates would restrain the proceeding to such extremities until the danger were sufficiently immediate, or until some felony was either committed, or could not be prevented without recourse to arms ; and, at all events, the assistance given by men who act in subordination and concert with the Civil Magistrate, will be more effectual to attain the object proposed, than any efforts, however well intended, of separated and disunited individuals. But if the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of the Magistrate, it is the duty of every subject to act for himself and upon his own responsibility in suppressing a riotous and tumultuous assembly ; and he may be assured that, whatever is honestly done by him in the execution of that object, will be supported and justified by the common law. The law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen, lying under the same obligation, and invested with the same authority to preserve the peace of the King, as any other subject. If the one is bound to attend the call of the Civil Magistrate, so is the other ; if the one may interfere for that purpose when the occasion demands it, without the requisition of the Magistrate, so may the other too ; if the one may employ arms for that purpose, when arms are necessary, the soldier may do the same. Undoubtedly, the same exercise of discretion which requires the private subject to act in subordination to and in aid of the Magistrate, rather than upon his own authority, before recourse is had to arms, ought to operate in a stronger degree with a military force. But where the danger is pressing and immediate, where a felony has actually been committed, or cannot otherwise be prevented, and from the circumstances of the case no opportunity is offered of obtaining a requisition from the proper authority, the military subjects of the King not only may, but are bound to do their utmost, of their own authority, to prevent the perpetration of outrage, to put down riot and tumult, and to preserve the lives and property of the people. Still further, by the common law, not only is each private subject bound to exert himself to the utmost, but every Sheriff, Constable, and other Peace Officer is called upon to do all that in them lies for the suppression of the riot, and each has authority to command all other subjects of the King to assist them in that undertaking. By an early statute (13 H. IV, cap. 7), any two Justices, with the Sheriff or under-Sheriff of the county,

may come with the power of the county, if need be, to arrest any rioters, and shall arrest them; and they have power to record that which they see done in their presence against the law; by which record the offenders shall be convicted, and may afterwards be brought to punishment. And here I must distinctly observe, *that it is not left to the choice or will of the subject, as some have erroneously supposed, to attend or not to the call of the Magistrate, as they think proper, but every man is bound, when called upon, under pain of fine and imprisonment, to yield a ready and implicit obedience to the call of the Magistrate, and to do his utmost in assisting him to suppress any tumultuous assembly.*

“The only point on which we have—I will not say altered, but somewhat amplified—the law of England is in reference to the responsibility of soldiers for acts done in dispersing unlawful assemblies. The English law upon this point is somewhat indefinite, and it is by no means clear that, if a Magistrate calls upon an officer to disperse an assembly, and if the officer orders his troops to fire, and if the troops do fire, and if the Magistrate is mistaken in the view which he takes of the requirements of his case, that his orders protect the officer, or that the officer's orders protect the soldier. Military men may thus be placed between two conflicting authorities. The soldier may be liable to be tried by Court Martial for disobeying orders if he does not fire, and to be tried at the Assizes for murder if he does. I will not now go into the legal aspects of the matter; but it is by no means clear that, according to the law of England, the actual necessity for the order, as distinguished from the order itself, is not the condition of the legality of an order to attack a mob by military force. This, no doubt, arose from the extreme jealousy with which English lawyers have always regarded the interference of soldiers in civil matters, and this jealousy is to be explained by historical causes which happily do not exist in this country. I think I need hardly insist upon the monstrous injustice of the rule itself, if such it is. What possible means have subordinate officers or private soldiers of knowing whether it is or is not necessary to disperse a particular assembly or to use more or less force for that purpose? To make a common soldier a murderer for shooting people whom he is ordered to shoot, because a jury afterwards thinks that it was not necessary that they should be shot, seems to me as absurd as to say that every one who deals in any way with stolen goods is to be treated as a receiver whether he knew they were stolen or not. It will, I trust, be made perfectly clear by the provisions of this Bill that no one commits a crime by any act done by him in good faith for keeping the peace. Section 483 protects the Magistrate who orders an assembly to be dispersed by military force, if he regards the measure as necessary to the public security on reasonable grounds and in good faith. Sections 484 and 485 make it the duty of the officer in command to obey the Magistrate's requisition; and whilst they put upon him the responsibility, which he clearly ought to bear, of deciding on the manner in which the requisition is to be carried out, and of doing as little injury to person and property as is consistent with carrying it out effectually, they protect him from all responsibility for the order itself. In the same spirit, Section 486 protects every inferior officer and soldier for every act done in obedience to any order which he was bound to obey by the Mutiny Act or the Indian Articles of War.

"We also propose that prosecutions for excess in acts done under these sections should not be permitted without sanction from the Local Government. My own personal experience has led me to feel, perhaps more deeply than most other persons, the necessity for such a provision as this, and has impressed me with the evils which may arise from the defective state of the law, which leaves it in the option of private persons to carry on a series of proceedings, under no public check whatever, which might break a man's heart when he is perfectly innocent. I can imagine cases in which a man who had only done his duty might be baited to death by one prosecution after another, for murder, hurt, mischief, and the like, nor do I see how the Government could protect him in the absence of this provision. I do not know that such cases have as yet occurred, but nothing is more likely than their occurrence, as native lawyers become familiarized with English law, unless we provide for the matter beforehand.

"The principle of sanction is well established in Indian Law and is of great value, and this appears to me to be just the sort of case to which it ought to be applied."

481. If, upon being so commanded, any such assembly does not disperse, or if, without being so commanded, it conducts itself in such a manner as to show a determination not to disperse, any Magistrate or officer in charge of a Police-station may proceed to disperse such assembly by force, and may require the assistance of any person, other than any European or Native troops of Her Majesty acting as such, for the purpose of dispersing it, and arresting the persons who form part of it.

482. If an unlawful assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Magistrate of the highest rank who is present may cause it to be dispersed by Military Force.

483. No Magistrate shall be held to commit any offence by ordering the dispersion by Military Force of any assembly the dispersion of which he regards, on reasonable grounds and in good faith (Section 52, I. P. C.,) as necessary to the public security.

484. When a Magistrate determines to disperse an assembly by Military Force, he may require any officer in command of any of Her Majesty's troops, whether European or Native, to disperse such assembly by such

force, and it shall be the duty of every such officer to obey every such requisition in such manner as in his discretion appears proper ; but in doing so he shall use as little force and do as little injury to person and property as is consistent with dispersing the assembly and arresting and detaining such persons as he may be directed by the Magistrate to arrest and detain, or as it may be necessary to arrest and detain for the purpose of dispersing the assembly.

485. No officer obeying any such requisition shall be held to have committed any offence by any act done by him in good faith (Section 52, I. P. C.) in order to comply with it.

What acts done in obeying requisition not an offence.

486. No inferior officer or private soldier shall be held to have committed any offence by any act done for the dispersion of any such assembly in obedience to any order which he was bound by the Mutiny Act or by the Indian Articles of War to obey.

Acts of inferior officers and soldiers done in obedience to order not an offence.

487. When the public security is manifestly endangered by an unlawful assembly, and when no Magistrate can be communicated with, any Commissioned Officer of Her Majesty's European or Native Forces may disperse any such assembly by military force ; and in doing so, he shall have the same protection (Section 483, *post*) as a Magistrate, and all officers and soldiers acting under his orders shall have the protection mentioned in Section 486 ; but as soon as such Commissioned Officer can communicate with any Magistrate, it is his duty to do so.

Duty of Queen's officers to suppress assembly.

With these clear provisions to guide those concerned, there is now less chance of any such embarrassment or hardship arising as there was before such a law existed. Now, when a military officer has to act in the absence of a Magistrate, the clear wording of this chapter gives him a safe basis on which to act.

488. No prosecution against any Magistrate, officer, or soldier, for any act done under the provisions contained in Sections 481, 482, 484, and 487, shall be instituted in any Criminal Court except with the sanction of

Sanction required to prosecutions for acts done under Sections 481, 482, 484, and 487.

the Government of India, or the Government of Madras or Bombay.

The C. C. P. Bill, as it passed the Select Committee, permitted Local Governments to sanction prosecutions under the sections mentioned in this chapter. The section as it now stands was amended in Council. Mr. Stephen opposed the amendment, as "he thought that the difficulty that would be attendant upon obtaining the sanction of the Government of India to a prosecution would be tantamount to prohibiting prosecution altogether." Messrs. Campbell, Strachey, and Inglis voted with Mr. Stephen; but as the majority were for the amendment, the amendment was carried.

CHAPTER XXXVII.

OF SECURITY FOR KEEPING THE PEACE.

This chapter contains the provisions of Chapter XVIII, Act XXV of 1861, and lays down explicitly that the imprisonment under this chapter is to be *simple* imprisonment: on this point the old law was silent. The provisions of this chapter apply to European British subjects (*vide* Section 11, *ante*). Under this chapter cash may be taken as security (*vide* Section 399, *ante*).

(280) 489. Whenever a person, *accused* of rioting, assault, or other breach of the peace, or with abetting the same, or with assembling armed men, or taking other unlawful measures with the evident intention of committing the same, is convicted of such offence before a Court of Session, or Magistrate of a division of a District, or Magistrate of the first class,

And the Court or Magistrate, by which or by whom such person *is convicted*, or the Court or Magistrate, by which or by whom the final sentence or order in the case is passed, is of opinion that it is just and necessary to require such person to give a personal recognizance for keeping the peace,

Personal recogni-
zance to keep the peace
in cases of conviction.

Such Court or Magistrate may, in addition to any other order passed in the case, direct that the person so convicted be required to execute a formal engagement, in a sum proportionate to his condition in life and the circumstances of the case, for keeping the peace during such period as it may appear proper to fix in each instance, not exceeding one year if the sentence or order be passed by a Magistrate, or three years if the sentence or final order be passed by a Court of Session, with a provision that if the same be not given the person required to enter into the engagement shall be kept in simple imprisonment for any time not exceeding one year, if the order be passed by a Magistrate, or three years if the order be passed by the High Court or by a Court of Session, unless, within such period, such person execute such formal engagement as aforesaid.

If the accused person be sentenced to imprisonment, the period for which he may be required to execute a recognizance, and the imprisonment in default of executing such recognizances, *shall commence when he is released on the expiration of his sentence.*

When any accused person is convicted of any offence specified in this section by a Magistrate neither in charge of a division of a District nor of the first class, such Magistrate, if he considers it just and necessary to require a personal recognizance for keeping the peace from the person so convicted, shall report the case to the Magistrate of the District, the Magistrate of the division of the District, or to a Magistrate of the first class to whom such Magistrate is subordinate; and the Magistrate to whom the case is so reported shall deal with the case as if the conviction had been before himself.

In any case where the order is not made at the time of signing, or by the Court which signs the judgment, the convict must be produced before the Magistrate who adds the order to enter into a personal recognizance to the original sentence.

This section was substituted for Section 4, Act VIII of 1869; the amendment there made was requisite to meet the case of dangerous

criminals. The present section is somewhat altered from the section as it stood before—the word “*accused*” is substituted for “*charged*,” and, further, the present law directs that the period for which the accused, if imprisoned, may be required to give a recognizance, “*shall commence when he is released on the expiration of his sentence.*” The words “*any other order passed in the case,*” in paragraph 3, have been added to this section by the present Act X of 1872. The last paragraph is new.

Is convicted.—A Magistrate has no power to make an order that the accused person should enter into a bond to keep the peace until after an adjudication that it is necessary for the preservation of the peace to take a bond from him, and until he is satisfied on that point, unless there is an admission by the party against whom the order is to be made (Cr. R., 11 W. R., p. 50.) See explanation to Section 491, *post*.

Separate proceedings should be taken against each person ordered to find security, unless there be some association between them (H. C. Pro., 17th March, 1863).

(281) 490. Whenever it appears necessary to require security to keep the peace, *in addition* to the personal recognizance of the party so convicted, the Court or Magistrate empowered to require personal recognizance, may require security in addition thereto, and may fix the amount of the security-bond to be executed by the surety or sureties; with a provision that, if the same be not given, the party required to find the security shall be kept in simple imprisonment for any time not exceeding one year if the order be passed by the Magistrate of the District, Magistrate of a division of a District, or by a first class Magistrate, or three years if the order be passed by the High Court or by a Court of Session.

In addition to.—The words “in addition,” in this and the preceding section, refer to the substantive sentence passed on the accused, in consequence of which sentence, and without any further inquiry, such person is at once liable to be called on for either recognizance or security or both; so that an order should be passed at the time of deciding the original case. If no such order is then made, subsequent proceedings must be taken under Section 491, *post*, and the parties summoned to show cause (15 W. R., 56).

The security bond must be on an eight-anna stamp (Act VII, 1870, Schedule II, 6).

(282) 491. Whenever a Magistrate of a division of a

Summons to any person to show cause why he should not give bond to keep peace.

District, or a Magistrate of the first class, receives *information* that any person is likely to commit a breach of the peace, or to do any act that may probably occasion a breach of the peace, he may summon such person to attend at a time and place mentioned in the summons, to show cause why he should not be required to enter into a bond to keep the peace, with or without sureties, as such Magistrate thinks fit.

Explanation 1.—A summons, calling on a person to show cause why he should not be bound over to keep the peace, may be issued on any report, or other *information which appears credible*, and which the Magistrate believes; but the Magistrate cannot bind over a person *until he has adjudicated on evidence before him*.

Explanation 2.—A Magistrate may recall a summons issued under this section if he thinks proper.

Information which appears credible.—If a Magistrate considers the complaint of a person is “credible information,” there is no reason why a Magistrate should not act under this section. It is for the Magistrate to determine the credibility of the evidence: it is also incumbent on him to take evidence in the accused’s presence before making an absolute order directing the accused to enter into a bond to keep the peace. But the Magistrate, if satisfied on credible information that a breach of the peace is likely to occur, *may call on accused to show cause* why he should not be bound over, without first confronting him with the person giving the information.

(283) 492. Such summons shall set forth *the substance of the report or information* on which it is issued, the amount of the bond, and the term for which it is to be in force, and if security is called for, the number of sureties required, and the amount in which they are to be bound respectively, *and the time and place at which the person summoned is required to attend*.

Explanation.—When the parties are present in Court, no summons is necessary, but the person to whom a summons would have been issued, must have an opportunity to show cause why he should not be bound.

The substance of the information.—The summons to a person to show cause why he should not be required to furnish recognizances to keep the peace should, under this section, set out the substance of the information

against him. When the party summoned shows cause, the Magistrate, in taking evidence, should look not merely to the question of possession, if the case is one under Section 532, *post*, but also whether he is satisfied that there was a probability of a breach of the peace (15 W. R., 44).

The words *and the time and place, &c.*, at the end of this section, printed in italics, have been added by the present Act X of 1872; so also the explanation.

(284) 493. The bond shall be in the form (E) given in the second schedule, or to the like effect, and its penalty shall be fixed with a due regard to the circumstances of the case and of the means of the party.

Penalty of bond.

The amount in which the sureties shall be bound shall not exceed the penalty named in the bond.

Bail-bonds in criminal cases are exempt from stamp-duty. Bail-bonds, or other instruments of obligation not otherwise provided for by the Court Fees Act, when given under the direction of any Court or executive authority, shall bear a stamp fee of eight annas.

(285) 494. If the person summoned does not attend at the time and place named in the summons on the day appointed, such Magistrate, if satisfied that the summons has been duly served, may issue a warrant for his arrest :

Warrant of arrest.

Provided that, whenever it appears to such Magistrate, upon the report of a Police Officer or upon *other credible information* (the substance of which report or information *shall be recorded*), that there is just reason to fear the commission of a breach of the peace, which may probably be prevented by the immediate arrest of any person, the Magistrate may at any time issue a warrant for his arrest.

Other credible information.—*Vide* notes on this point under Section 491, *ante*.

Shall be recorded.—The credible information, or, rather, the substance of it, must appear on the face of the Magistrate's order, and on the warrant of arrest issued under this section.

(286) 495. The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of the person informed against under Section 491, and may permit him to appear and enter into the required security,

Magistrate may dispense with personal attendance of person informed against.

or show cause against such requisition, by an agent duly authorized to act in his behalf.

There is no appeal against an interlocutory order, such as a claim to appear by agent (Section 286, *ante*).

(287) 496. If on the appearance of such person informed against, or of his agent, if he is permitted to appear by agent, the Magistrate is not satisfied that there is occasion to bind such person to keep the peace, the Magistrate shall direct his discharge.

(288) 497. If the Magistrate is satisfied that it is necessary for the preservation of the peace to take a bond from such person with or without security, he shall make an order accordingly ; and if such person fails to comply with the order, the Magistrate may order him to be kept *in simple imprisonment* until he furnish the same.

This section lays down explicitly that the imprisonment is to be *simple* imprisonment : on this point the old law was silent. The words of the old law were "committed to jail," which might mean simple or rigorous imprisonment ; and the consequence was, diversity of procedure throughout the country.

If a Magistrate thinks the security entered in a summons not sufficient, he must issue a fresh one, or else give the parties summoned sufficient opportunity to show cause : he cannot arbitrarily increase the amount (18 W. R., 61).

(289) 498. The period for which the Magistrate may bind a person to keep the peace with or without security, shall not exceed one year.

When a person is imprisoned under Section 497, he shall not be detained by authority of the Magistrate beyond the term of one year, and shall be released whenever within that term he complies with the order.

(290) 499. Whenever it appears to the Magistrate that it is necessary for the preservation of the peace to bind a person *beyond the term of one year*, he may, before the expiration of the first year, record his opinion to that effect, and the

grounds thereof, and may refer the case for the orders of the Court of Session.

Such Court, after examining the proceedings of the Magistrate, and making such further inquiry as it thinks necessary, may, if it see cause, authorize the Magistrate to extend the term for a further period not exceeding one year.

If such person fails to give a bond, with security, if required, for his keeping the peace for such further period as the Magistrate under the orders of the Court of Session directs, he may be kept in simple imprisonment for such further period, or until, within that period, he gives such bond.

Explanation.—When the subject of dispute, or ground for apprehension, *is the same as that on which the first order was passed*, the Magistrate must proceed under this section if the first bond is still in force, and not under Section 491.

Beyond the term of one year.—A Magistrate cannot bind down parties already bound down to keep the peace beyond the term of their first recognizances without proceeding under this section (7 W. R., Cr. R., p. 26).

Is the same, &c.—Where a matter in respect of which further security to keep the peace is required is the same as that before the Magistrate on the first occasion, the case can only be dealt with under this section (Cr. R., 7 W. R., p. 23).

The pith of this ruling has been enacted in the explanation to the present section.

(291) 500. The Magistrate of the District may, if he see sufficient cause, discharge any recognizance and surety for keeping the peace taken by him, or by one of his subordinates, or by his predecessor under the preceding sections, *and may order* the release of the person confined for default in entering into such recognizance or giving such security.

And may order.—A Magistrate may, under this section, cancel an order passed by him under Section 491 (Cr. R., 10 W. R., p. 40; *Musst Anunderkoer v. Ranees Soonet Kooer*).

(292) 501. A surety for the *peaceable conduct* of another person may at any time apply to the Magistrate to be relieved from his engagement as surety.

On such application being made, the Magistrate shall issue his summons or warrant, in order that the person for whom such surety is bound may appear or be brought before him.

On the appearance of the person to such warrant, or on his voluntary surrender, the Magistrate shall direct the engagement of the surety to be cancelled, and shall call upon such person to give fresh security, and in default thereof shall order him to be kept in *simple imprisonment*.

The words *peaceable conduct* have been substituted for the words "*personal appearance*," and *simple imprisonment* for *custody*. (*Vide* note on this point under Section 497, *ante*.)

(293) 502. Whenever it is proved before the Magistrate that any recognizance or other bond taken under this chapter has been forfeited, he shall record the grounds of such proof, and shall call upon the person, bound by such recognizance or bond, to pay the penalty thereof, or to show cause why it should not be paid.

Recovery of penalty
from principal.

If sufficient cause be not shown and the penalty be not paid, the Magistrate shall proceed to recover the same *by issuing a warrant* for the attachment and sale of any of the movable property belonging to the person bound by such recognizance or bond.

Such warrant may be executed within the jurisdiction of the Magistrate of the District in which it is issued; and it shall authorize the distress and sale of any movable property belonging to the person bound without the jurisdiction of the said Magistrate, when endorsed by the Magistrate of the District in which such property is situated.

If such penalty be not paid and cannot be recovered by such attachment and sale, such person shall be liable to imprisonment by order of the Magistrate in the civil jail for a period not exceeding six months.

The penalty shall not be enforced until the person bound has had an opportunity of showing cause, and until the breach of the conditions has been proved.

The commission or attempt to commit, or abetment of any offence, whatever and wherever it may be committed, is a breach of the bond.

Proceedings under this chapter may be taken either in the district in which the breach of the peace is apprehended, or where an offence has been committed in breach of the bond, or in any district where the person it is desired to bind may be.

This section contains the spirit of the old Section 293, Act XXV of 1861, but has been somewhat altered and added to, the last three paragraphs of the section being new, and further the Magistrate is given power to authorize the distress and sale of movable property without his District when endorsed by the Magistrate of the District in which such property is situated.

Where the terms of a bond to keep the peace are general, the recognizances may be forfeited on any breach of the peace, whether the assault be committed against the person on whose charge the bond was originally taken or not (15 W. R., 14). On a bond to keep the peace generally, the amount can be escheated if the peace is broken under any circumstances (*id.*, 6 B. L. R., App. 67).

A executes in District T a recognizance to keep the peace towards B. A was afterwards convicted in District S of having assaulted B in that District. *Held*, A had forfeited his recognizance, and the Magistrate in District T could proceed against him under this Section (B. L. R., vol. ii, part vii, p. 11, 1869).

(294) 503. Whenever it is proved before the Magistrate that any bond with a surety has been forfeited, the Magistrate may at his discretion give notice to the surety to pay the penalty to which he has thereby become liable, or to show cause why it should not be paid.

Recovery of penalty
from surety.

If no sufficient cause is shown, and such penalty is not paid, the Magistrate may proceed to recover payment of the penalty from such surety in the same manner as from the principal party.

Amendment 44 of 1874.—To Section 503, the following words shall be added (namely) :—

“And in case such penalty cannot be so recovered, the surety shall be liable, by order of such Magistrate, to imprisonment in the civil jail for a period not exceeding six months.”

CHAPTER XXXVIII.

OF SECURITY FOR GOOD BEHAVIOUR.

This chapter contains the provisions of Chapter XIX, Act XXV of 1861.

The provisions of this chapter do not apply to European British subjects (*vide* Section 11, *ante*, and Section 517, *post*); and by the provisions of Section 399, *ante*, cash cannot be taken as security under this chapter.

(295) 504. Whenever it appears to the Magistrate of the District, or to a Magistrate of the first class, that any person *is lurking* within his jurisdiction, or that there is within his jurisdiction a person *who has no ostensible means of subsistence*, or who cannot give a satisfactory account of himself, such Magistrate *may require such security* for such person's good behaviour for a period not exceeding six months as to him may appear good and sufficient.

If in any case under this or the two following sections the person to be bound is under sentence for an offence, he must be brought up on or after the expiration of his sentence for the purpose of being bound.

If a Sessions Judge, or Magistrate of the second or third class, considers, from evidence taken in any proceedings before him, that any person should be required to enter into a bond to be of good behaviour, he may send such person in custody to a competent Magistrate.

A Magistrate in charge of a division of a District, exercising the powers of a Magistrate of the second class, may make any inquiry necessary under this chapter, and may submit his proceedings to the Magistrate of the District, who may pass such order on them, either directing the person whose character was inquired into to furnish security or not, as he thinks fit.

When Magistrate may require security for good behaviour for six months.

Binding of sentenced person.

When Sessions Judge or unauthorized Magistrate thinks a person should be bound.

Powers of Magistrate of Division of District being a Magistrate of the second class to inquire.

The three last paragraphs of this section have been added by the present Act X of 1872.

The Magistrate must satisfy himself that the security offered is sufficient, and that the surety is a safe one to be relied on;—the law says, “*good and sufficient*.” Security can now be demanded from suspected parties, even though the offence they are charged with be not specifically proved against them. The matter must be adjudicated by the Magistrate on evidence adduced before him, and taken by himself; he cannot convict merely on the report of a Police Officer.

Is lurking.—This section does not apply to prisoners convicted and punished for theft, and who cannot, therefore, be said to be lurking within the Magistrate’s jurisdiction (*Queen v. Keenee Sonur*, Calcutta H. C., 15th April, 1867).

The action taken under this section is irrespective of any proceedings on account of any offence committed (C. L., 1 W. R., 14).

The surety for another’s good behaviour under this chapter should be required to appear in person before the Magistrate; and that officer should satisfy himself, either through the agency of the Police or otherwise, that the surety really is the man he represents himself to be (J. C. O., Circular No. 43 of 1869).

May require such security.—Security cannot be demanded under this chapter “in addition to” a specific punishment passed upon a prisoner. That is to say, a man sentenced to one year’s imprisonment for house-breaking cannot legally be called on to furnish security for his good behaviour at the expiration of the sentence. It will, of course, be understood that the above instructions do not apply to recognizances, or security for keeping the peace from persons who have been convicted of rioting, assault, or other breach of the peace, under Chapter XXXVII of this Code (Circular 43, 1864, Judicial Commissioner, Oudh).

(296) 505. Whenever it appears to such Magistrate from the evidence as to general character adduced before him, *that any person is by repute a robber*, house-breaker, or thief, or a receiver of stolen property, knowing the same to have been stolen,

Or of notoriously bad livelihood, *or is a dangerous character*,

Such Magistrate may require similar security for the good behaviour of such person for a period not exceeding one year.

That such person is by repute a robber, &c.—Where a person is adjudicated to be a person of notorious bad character under this section, after having been tried for dacoity, the evidence taken in the trial for dacoity should not be used against the accused with reference to the accusation under this section, which evidence should be taken independently (13 W. R., 18).

When Magistrate
may require security
for good behaviour for
one year.

If it be proved that any one is one of the persons described in this section, the Magistrate should demand security for one year, at the end of which he may proceed under the following section (506). W. R., Cr. Letter No. 1120, of December, 1864.

The words *or is a dangerous character* have been added to this section by the present enactment, Act X of 1872.

(297) 506. Whenever it appears to such Magistrate from the evidence as to general character ad-
Procedure where se-
curity required for
more than one year. duced before him, that any person is by
habit a robber, house-breaker, or thief,

Or a receiver of stolen property, knowing the same to have been stolen, *or of a character so desperate and dangerous* as to render his release, without security, at the expiration of the limited period of one year, hazardous to the community, he shall record his opinion to that effect, with an order specifying the amount of security which should, in his judgment, be required from such person, as well as the number, *character, and class* of sureties, and the period, not exceeding three years, for which the sureties should be responsible for such person's good behaviour, and if such person does not comply with the order, the Magistrate shall issue a warrant directing his detention pending the orders of the Court of Session.

Of a character so desperate or dangerous.—Before action can be taken under this section, it must be proved that accused is of a dangerous character; his simply being violent is not sufficient, *e.g.*, a person was accused of attempt to murder, but was acquitted; it was however held, that as he was a wandering Fakeer, armed with a deadly weapon, liable to be easily excited, this section could be applied and he be proceeded against under provisions of this section.

The words *character and class* have been added to the provisions of this section by the present enactment, Act X of 1872, so that these are points to be carefully considered; and if the Magistrate is not satisfied, he is bound, under the provisions of the following section, to reject the surety.

(298) 507. If a person required to furnish security, under the provisions of the last preceding section, does not furnish the same, *or offers sureties whom the Magistrate sees fit to reject*, the proceedings shall be laid, as soon as conveniently may be, before the Court of Session.

Such Court, *after examining such proceedings, and re-*

quiring any further information or evidence which it thinks necessary, may pass orders on the case, either confirming, modifying, or annulling the orders of such Magistrate as it thinks proper.

Or offers sureties, &c.—This provision has been added to this section by the present enactment, Act X of 1872. The powers conferred by this section on the Court of Sessions appear to be of an appellate or revisional character. Action under this section should be taken separately and irrespectively of any commitment to the Sessions, of offences under Penal Code.

(299) 508. If the Court of Session does not think it safe to direct the immediate discharge of such person, it *shall fix a period for his detention, not exceeding three years*, in the event of his not giving the security required from him.

Court of Session
may require security
for period not exceed-
ing three years.

Shall fix a period for his detention, &c.—When proceedings are taken under this and the two preceding sections, the Magistrate should issue a warrant directing the prisoner to be detained, until receipt of the Court of Session's order, with a proviso that such detention is not to exceed three years; on the case being finally disposed of by Court of Session, it should send a copy of its order with a warrant for its execution to the officer in charge of the jail (W. R., Cr. Letter No. 98, of January, 1868).

(300) 509. Whenever security for good behaviour is required by the Court of Session or by a competent Magistrate, the amount, the security, the number *and description* of sureties, and the period of time for which the sureties are to be responsible for the good conduct of the person required to furnish security, shall be stated in the order.

Contents of order
for security.

The security-bond shall be in the Form (G) given in the second schedule, or to the like effect.

And description.—These words have been added by the present enactment. (See notes as to "character" and "class" under Section 506, *ante*.)

(301) 510. In the event of any person required to give security under the provisions of this chapter failing to furnish the security so required, he *shall be committed to prison until he furnish the same*.

Imprisonment in de-
fault of security.

Provided that no such person shall be kept in prison for a longer period than that for which the security has been required from him.

Imprisonment under this section *may be rigorous or simple, as the Court or Magistrate in each case directs.*

Shall be committed to prison, &c.—H. C., Calcutta, have laid it down that, after expiration of the term of confinement in default of security, a second security cannot be demanded, except upon some new proof of bad livelihood, or that a person is not capable of following an honest calling (Cr. R., 6 W. R., p. 18).

May be rigorous or simple.—As regards the nature of the imprisonment to be undergone by a person failing to furnish security, the law was silent, and the practice from published rulings not uniform. In Bengal, North-Western Provinces, and Oudh, the term “shall be committed to prison” implied “*simple imprisonment*.” The Judicial Commissioner of the Punjab ordered that the imprisonment should be “*rigorous*,” but may be simple. In Madras it was left to the officer of the jail to use his discretion. In Section 306 of the Bill for Regulating the Procedure of the Courts of Criminal Judicature there was a proviso to the effect “that no person so committed shall be rigorously imprisoned.” But Act X of 1872 has put this matter at rest by the last clause of this Section 510, which leaves it to the Court to direct in each case whether the imprisonment is to be rigorous or simple.

(302) 511. The Magistrate of the District may, at any time, exercise his discretion in releasing, without reference to any other authority, any prisoner confined under requisition of security for good behaviour, whether by his own order, or that of his predecessor in office, or by the order of any officer subordinate to him, provided he is of opinion that such person can be released without hazard to the community.

(303) 512. Whenever the Magistrate of the District is of opinion that any person confined under requisition of security for good behaviour by order of a Court of Session, can be safely released without such security, such Magistrate shall make an immediate report of the case for the orders of such Court of Session.

(304) 513. A surety for the good behaviour of a person may at any time apply to a competent Magistrate to be relieved from his engagement as such surety.

On such application being made, such Magistrate shall issue his summons or warrant, in order that such person may appear or be brought before him.

On the appearance of such person pursuant to *such summons* or warrant, or on his voluntary surrender, such Magistrate shall direct the engagement of the surety to be cancelled, and shall call upon the person so appearing or surrendering to give fresh security, and in default thereof shall commit him to custody.

Such summons.—These words have been added by the present enactment, under the old law the section ran “pursuant to the warrant, &c.”

(305) 514. Whenever a competent Magistrate is of opinion that, by reason of an offence, Recovery of penalty from sureties. proved to have been committed by a person, for whose good behaviour security has been given, subsequent to his having given such security, proceedings should be had upon the bond executed by the surety, such Magistrate shall give notice to the surety to pay the penalty, or to show cause why it should not be paid.

If such penalty be not paid and no sufficient cause for non-payment be shown, such Magistrate shall proceed to recover the penalty from such surety by issuing a warrant for the attachment and sale of any movable property belonging to him. Such warrant may be executed within the jurisdiction of the Magistrate of the District in which it is issued; and it shall authorize the distress and sale of any movable property, belonging to such surety, *without the jurisdiction of the said Magistrate*, when endorsed by the Magistrate of the District in which such property is situated.

If such penalty be not paid, and cannot be recovered by such attachment and sale, the surety shall be liable to imprisonment by order of such Magistrate in the civil jail for a period not exceeding six months.

The power given by the latter portion of the second paragraph of this section as to the distress and sale of movable property in another District when endorsed by the Magistrate of the District in which such property is situated has been given by the present enactment. The bond

is forfeited "by reason of an offence proved to have been committed by a person for whose good behaviour security has been given."

(306) 515. The provisions of Sections 492 and 494, relating to the issue of summons and warrant of arrest for securing the personal attendance of the party informed against, *when such party is not in custody*, shall apply to proceedings taken under this chapter against persons required to give security for their good behaviour.

Proceedings may be taken under this chapter against persons amenable to its provisions, in any district where they may be held.

(307) Any evidence, taken under Chapter XXXVII or this chapter, shall be taken as in cases usually heard by a Magistrate upon summons.

Any previous conviction against the person to be bound may be proved on proceedings held under this chapter.

The words "*when such party is not in custody*" have been added to the original Section 306, Act XXV 1861, by the present Section 515, C. C. P., and paragraphs 3 and 4 have been added.

516. A Magistrate may refuse to accept any surety offered under this chapter on the ground that such surety is an unfit person.

This section has been added to this chapter by the present enactment, Act X of 1872.

Chapter not applicable to European British subjects. 517. The provisions of this chapter shall not apply to European British subjects.

Cases under this chapter applying to European British subjects appear to be sufficiently and more appropriately dealt with under the European Vagrancy Act.

CHAPTER XXXIX.

LOCAL NUISANCES.

This chapter contains the provisions of Sections 62, 63, and Chapter XX, Act XXV of 1861, and applies generally to *public* nuisances; to public roads, not to private paths; and if the path be not treated as a public way a suit will lie to set aside the Magistrate's order. The explanations to Section 518 have been added by the present enactment, Act X of 1872, clearing up the intention of the Legislature, and superseding several judicial rulings. I say *generally* to "public nuisances." The exception is Section 518. An order passed under this Section 518 is an order passed by the Magistrate as an executive officer, and can be rescinded by him whenever he sees fit to rescind it. There is no appeal against an order passed under this chapter (*vide* Section 286 *e*). But should the party affected think the order illegal, all he has to do is to disobey it, which will end in his being prosecuted under Section 188, I. P. C., and so settle the point, or he can bring an action in the Civil Court.

(62) 518. A Magistrate of the District, or a Magistrate of a division of a District, or any Magistrate specially empowered, may, by a written order, direct any person to *abstain from a certain act*, or to take *certain order with certain property* in his possession, or under his management, whenever such Magistrate considers that such direction is likely to prevent, or tends to prevent,

Magistrate may issue orders to prevent obstructions, danger to human life, or riots.

Obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury, to any persons lawfully employed,

Or danger to human life, health, or safety,

Or a riot or an affray.

Explanation 1.—This section is intended to provide for cases where a *speedy remedy* is desirable, and where the delay, which would be occasioned by a resort to the procedure contained in Section 521 and the next following sections, would, in the opinion of the Magistrate, occasion a greater evil than that suffered by the individual upon whom the order was made, or would defeat the intention of this chapter.

Explanation 2.—An order may, in cases of emergency, or in cases where the circumstances do not admit of the serving of notice, be passed *ex parte*, and may in all cases be made upon such information as satisfies the Magistrate.

Explanation 3.—An order may be directed to a particular individual; or to the public generally when frequenting or visiting a particular place. (This Explanation 3 overrides the decision of the C. H. C. *in re* Ameeroodeen, 12 W. R., 36, that an order must be directed to a particular individual, and not to the public generally. This provision applies to "Mohurram" processions, "Hole" Festivals, Méléas, &c.)

Explanation 4.—Any Magistrate may recall or alter any order made under this section by himself or by his predecessor in the same office.

The non-compliance with an order under this section is punishable by Section 188, P. C.

Certain act . . . certain order . . . certain property.—The word *certain* placed before the word *act*, and afterwards repeated twice in the expression "to take *certain* order with *certain* property," shows clearly the Legislature's intention to give full and ample powers to the Magistrate of preserving the peace, and restraining *any* person from doing *any* act, or commanding him to hold *any* property in his possession, subject to *any* condition, whenever such Magistrate considers such a course likely to prevent a riot or an affray. Such power is, of course, to be exercised in a reasonable manner; and the Magistrate, before issuing the order, ought to satisfy himself upon reasonable grounds that the order is likely to prevent a riot or an affray. The law rightly gives a very wide discretion to the Magistrate in matters affecting the public tranquillity. The powers vested in the Magistrate by this section are not confined to acts, and modes of enjoyment of property only which are *in themselves* unlawful. Not only do the actual words of this section not support such a restricted construction, but the adoption of such a line of argument would inevitably lead to the most dangerous consequences. A particular act or a particular mode of enjoyment of property might be perfectly innocent and lawful in itself. But the act may be done or the property enjoyed in that particular mode, under circumstances calculated to lead to a serious breach of the peace, attended with loss of human life. It has been *held*, in some cases, that a Magistrate has no power under this section to issue an order that would interfere with any one's right to enjoy his own property in any lawful manner he pleases. Be this as it may, it is quite within the Magistrate's power under this section to *modify* the enjoyment of such right, at least for a temporary period, by imposing upon the owner of the property such conditions as the Magistrate, after taking into consideration all the facts and surrounding circumstances of each case, shall consider necessary to prevent obstruction, annoyance, &c. Every individual right is, to a certain

extent, subject to the general interest of society (18 W. R., 52). It has also been *held*, that the Magistrate cannot pass an irrevocable order, e.g., to cut down trees (5 B. L. R., 131). In the previously quoted ruling, the modification of enjoyment of the right is spoken of as for "a temporary period" only.

The loss which one man fears may be entailed upon him by competition of another in the same line of business, is not an injury to property such as is contemplated by this section.

Speedy remedy.—This section is intended to provide the Magistrate with power to put an immediate determination to the continuance of acts, nuisances, &c., where speedy action is required; but if the nuisance is one from which no immediate danger is apprehended, he ought to proceed under Section 521 and the following provisions. This point was doubtful under the old law, but has now been cleared up by Explanation 1.

But this section has a very much wider scope than simply referring to nuisances. There are other sections in the Code which deal with *public* nuisances. But this section has not reference so much to the act itself as to the consequences likely to result from it. The following Section 519 expressly uses the term *public* nuisance; not so this section, and the reason is obvious. The provisions of this section are much wider than the provisions of Section 519. This Section 518 is not limited to the doing of *unlawful* acts, but says a Magistrate may direct a person to abstain from a certain act which may be *lawful* in itself. (*Vide* remarks of Couch, C. J., given above, *in re* By Kuntram Shaha Roy *v.* Meagan, 18 W. R., 52.)

Be passed ex parte.—Under this section (as it originally stood in Act XXV of 1861), a Magistrate had no power to issue an *ex-parte* order, on the representation of a party supported by the report of the Police, but now it appears that by the provisions of *Explanation 2* to this section such an order may be passed under certain circumstances, and upon such information as satisfies the Magistrate.

Under the provisions of the old law it was *held*, in the case of Bhyro Dyal Singh, 11 W. R., 46, that the mere report of a Police Officer was not sufficient to justify action under this section; but now, if such report satisfied the Magistrate, he might, it appears, act upon such information.

It should be borne in mind, that an order under this section must be a *written* order, not a verbal order. Orders under this section are not open to revision as long as they are within the Magistrate's jurisdiction passing them.

An order passed by a Magistrate under this section is not of the nature of a judicial proceeding, and is not open to revision under Section 297 (6 N. W. P. H. C. R.).

- (63) 519. A Magistrate of the District, or a Magistrate of a division of a District, or any Magistrate specially empowered, may enjoin any person (see 11 P. C.) not to *repeat or continue* a public nuisance, as defined in Section 268 of the Indian Penal Code or under any Local or Special Law.

Magistrate may prohibit repetition or continuance of public nuisances.

To repeat or continue.—Disobedience to an injunction against repeating or continuing a public nuisance is punishable under Section 291, Penal Code. It was held, *in re* Bukas Ram Sahoo, that a Civil Court was not competent to try a suit brought to question an order of a Magistrate to the discontinuance of a public nuisance (7 W. R., 11).

Orders not judicial proceedings.

520. Orders made under Sections 518 and 519 are not judicial proceedings.

In re Abbas Ali *v.* Ilm Meeah, 14 W. R., 46, the H. C. C. *held*, that an order passed by a Magistrate under Section 62, Act XXV of 1861 (similar to Section 518, *ante*) is not of the nature of a judicial proceeding. The opinion there expressed has been enacted in this Section 520.

(308) 521. Whenever a Magistrate of the District or a Magistrate of a division of a District, *or*, *when empowered by the Local Government in this behalf, a Magistrate of the first class*, considers that any unlawful obstruction or nuisance should be removed from *any thoroughfare or public place*,

Or that any trade or occupation, by reason of its being injurious to the health or comfort of the community, should be suppressed or should be removed to a different place,

Or that the construction of any building, or the disposal of any combustible substance, as likely to occasion conflagration, should be prevented,

Or that any building is in such a state of weakness that it is likely to fall, and thereby cause injury to persons passing by, and that its removal in consequence is necessary,

Or that any tank or well adjacent to any public thoroughfare should be fenced in such a manner as to prevent danger arising to the public,

Such Magistrate may issue an order to the person causing such obstruction or nuisance, or carrying on such trade or occupation, or being the owner, or in possession of, or having control over, such building, substance, tank, or well as aforesaid, calling on him, within a time to be fixed in the order,

To remove such obstruction or nuisance,

Or to suppress or remove such trade or occupation,

Or to stop the construction of such building,

Or to remove it,

Or to alter the disposal of such substance,

Or to fence such tank or well, as the case may be,
Or to appear before himself or some other Magistrate of the 1st or 2nd Class within the time mentioned in the order, and show cause why such order should not be enforced.

The issue of an order under this section shall be a *judicial proceeding* whether or not evidence is taken therein. (*A judicial proceeding*, this being so the order is open to revision by the High Court. *Vide* Section 297, *ante*.)

Order to be a judicial proceeding.

Such order may be issued on a report or other information which the Magistrate believes, and shall direct the person to whom it is addressed either to obey it or to show cause why it should not be obeyed. The order shall not be made absolute, except as is hereinafter provided, until opportunity has been given to the person affected to show cause.

Order to be in the alternative.

Explanation.—A “public place” includes property belonging to the State, camping grounds, and grounds left unoccupied for sanitary and recreative purposes.

The words “*or when empowered by the Local Government,*” &c., have been added to this section by the present enactment, as also the two last paragraphs, and the *explanation* to this section.

This section is applicable only to *public* nuisances, not to the violation of a private right. (For the definition of “public nuisance,” see Section 268, I. P. C., and notes.) The law now clearly lays down that orders under this section are judicial proceedings. The Magistrate can issue his order on any report or information that he believes to be true. There are several cases quoted in the Reports, laying down the principle that a suit will not lie to upset an order passed under this chapter. No appeal lies from an order passed under this section.

(309) 522. The order mentioned in Section 521 shall, *if practicable, be served personally* on the person to whom it is issued.

Service or notification of order.

But if personal service is found to be impracticable, such order shall be notified by proclamation, and a written notice thereof shall be stuck up at such place or places as may be best adapted for conveying the information to such person.

If practicable be served personally.—*In re Hochan v. Elliott*, it was laid down, that the mere error of not personally serving a notice to remove a nuisance, when it could be so served, was no ground for a Court of Session

to set aside proceedings under this chapter when the parties themselves did not take that objection (5 W. R., Cr. R., p. 4).

(310) 523. The person to whom such order is issued shall be bound, within the time specified in the order, to obey the same; or to appear before the Magistrate, before whom he was required by the order to appear and show cause as aforesaid; or he may apply (Act VII, 1870, Schedule II, Article I *b*) to such Magistrate for an order for a jury to be appointed to try whether such order is reasonable and proper.

Person ordered shall obey or may claim a jury.

On receiving such application (Act VII, 1870, Schedule II, Article I *b*), such Magistrate shall forthwith appoint a jury consisting of an uneven number of persons, not less than five, of whom the foreman and one-half of the remaining members shall be nominated by such Magistrate, and the other members by the applicant.

Suspension of order.

The execution of the order shall be suspended pending such inquiry, and the Magistrate who issued the order or before whom the applicant appears *shall be guided by the decision of the jury*, which shall be according to the opinion of the majority.

When order may be made absolute.

If the applicant by neglect or otherwise prevents, or if he does not claim the appointment of a jury, or if from any cause the jury so appointed *do not decide and report within a reasonable time*, the Magistrate may pass such order as he thinks proper, which order shall be carried out in the manner hereinafter provided.

Report of jury and order thereon.

The time within which the report is to be made shall be fixed by the Magistrate in the order for the appointment of the jury, and may from time to time be extended by him. When the jury have made their report, the order of the Magistrate must be founded thereon, except in cases falling under Section 528.

If the applicant fails to call for a jury, the Magistrate can carry out his order. But should a jury have been appointed, and have made a report before the Magistrate has carried out his order, the Magistrate must

(except in cases coming under Section 528, *post*) act on the jury's report, notwithstanding the jury had taken an unreasonable time in making their report.

524. Such Magistrate may summon so many jurors as may be necessary, and such persons shall be bound to attend and make their inquiry and report.

Attendance of jury.

Any juror failing to attend or neglecting his duty as a juror shall be liable to be dealt with under Section 174 of the Indian Penal Code.

This section has been added to the Code by the present enactment, Act X of 1872.

With this Section 524 read Sections 467, 470, and 473, *ante*.

(311) 525. If the person to whom the order mentioned in Section 521 is issued appears to show cause against the same, as hereinafter provided, the Magistrate shall take evidence in the matter; but if he does not appear or does not obey the order,

Or apply for a jury within the time specified in such order,

He shall be liable to the penalty prescribed in that behalf in Section 188 of the Indian Penal Code;

And the Magistrate who issued such order may proceed to carry it into execution at the expense of such person, and may realize such expenses, either by the sale of any building, goods, or other property removed by his order, or by the distress and sale of such movable property of such person within or without his jurisdiction. If such property is without his jurisdiction, the order shall authorize its attachment and sale when endorsed by the Magistrate in whose jurisdiction the goods are attached.

No suit shall lie in respect of anything necessarily or reasonably done in carrying out the provisions of this section.

The power of authorizing attachment and sale of movable property without the Magistrate's jurisdiction has been conferred by the provisions of this section: the old law did not contain this provision. The order of a Magistrate under this section is not absolutely protected, but only so when the proceedings are regular and according to the procedure in this chapter (Heeramund S. D. A., 1865, 125).

(312) 526. If, in a case referred to a jury, the jury find that the order of the Magistrate is reasonable and proper *as originally made, or subject to a modification which the Magistrate accepts*, the Magistrate who issued the order, *or before whom cause was shown*, shall give notice of such finding to the person to whom the order was issued, and shall add to such notice an order to obey the aforesaid order within a time to be fixed in the notice, and an intimation that in case of disobedience such person will be liable to the penalty provided by Section 188 of the Indian Penal Code.

If such latter order is not obeyed, the Magistrate may proceed as in Section 525.

The words in this section printed in italics have been added to the provisions of this section by the present enactment, Act X of 1872. The decision of the jury not being a judicial proceeding, no appeal lies from their order (16 W. R., 66).

(313) 527. If the person to whom the order of the Magistrate, under Section 521, is issued, appears and shows cause against it, so as to satisfy the Magistrate who issued it that it is not reasonable and proper, no further proceedings shall be taken in the case.

Amendment 45 of 1874.—In Section 527, for the words “four hundred and twenty-one,” the words “five hundred and twenty-one” shall be substituted.

When persons were served with notice under this section to remove a nuisance, showed cause before the Magistrate, but did not ask him to take evidence or to summon a jury, the High Court declined to interfere with the order passed by the Magistrate under Section 521 to remove the nuisance, as there appeared no illegality in the order (12 W. R., 24).

(314) 528. If the Magistrate who issued the order considers that immediate measures are necessary to be taken to prevent imminent danger or injury of a serious kind to the public, he may issue such an injunction to the person to whom the order under Section 521 was issued, as is required to obviate or prevent such danger or injury, *whether a jury is to be or has been appointed or not.*

In default of such person forthwith taking all necessary measures ordered to be taken by such injunction, the Magistrate may himself use or cause to be used such means as may be necessary to obviate such danger or to prevent such injury.

No suit shall lie in respect of anything necessarily or reasonably done for that purpose.

Under this section, as it originally stood, it was ruled that the summary proceedings that can be taken by a Magistrate under this section can only be taken *pending the inquiry of a jury*, and not when a jury has never been appointed; in this section, as it now stands, the words "pending the inquiry of a jury" have been omitted, and the words *whether a jury is to be or has been appointed or not* have been added by the present enactment, Act X of 1872.

(315) 529. Nothing in this chapter shall interfere with the provisions of Section 48 of Act No. XXIV of 1859 (*for the better regulation of the police within the territories subject to the Presidency of Fort St. George*), or of Section 34 of Act No. V of 1861 (*for the regulation of Police*), or of Section 16 of Act No. VIII of 1867 (*for the regulation of the District Police in the Presidency of Bombay*), of the Governor of Bombay in Council.

Section 16 of Act VIII of 1867 of the Governor of Bombay in Council, added by the present enactment to the provisions of this section.

CHAPTER XL.

POSSESSION.

This chapter contains the provisions of Chapter XXII, Act XXV of 1861; and power is given in this chapter to Criminal Courts convicting any person of an offence attended with criminal force, by which any person was dispossessed of immovable property, to restore the dispossessed person to possession without prejudice to the decision of a Civil Court.

This chapter applies to European British subjects.

(318) 530. Whenever the Magistrate of the District, or Magistrate of a division of a District, or Magistrate of the first class, is satisfied that a dispute, likely to induce a breach of the peace, exists concerning any land, *or the boundaries of any land, or concerning any houses, water, fisheries, crops, or other produce of land, within the limits of his jurisdiction, such Magistrate shall record a proceeding stating the grounds of his being so satisfied, and shall call on all parties concerned in such dispute to attend his Court in person, or by agent, within a time to be fixed by such Magistrate, and to give in a written statement of their respective claims, as respects the fact of actual possession of the subject of dispute.*

Such Magistrate shall, without reference to the merits of the claims of any party to a right of possession, proceed to inquire *and decide* which party is in possession of the subject of dispute.

After satisfying himself upon that point, he shall *issue an order* declaring the party or parties to be entitled to retain possession *until ousted by due course of law*, and forbidding *all disturbance of possession until such time*.

Explanation.—Such Magistrate may satisfy himself of the existence of a dispute likely to induce a breach of the peace from a report or other information, but the question of possession must be decided on evidence taken before him.

"On evidence taken before him."—Chapter XXV, Section 334, *et seq.*, deal with the mode in which such evidence is to be taken and recorded in an inquiry under this Chapter XL.

The words printed in italics in this section show the alterations made in its provisions by the present enactment, Act X of 1872.

The object of this section is to preserve the public peace, not to right the wronged,—the wronged has his remedy in a regular suit. A Magistrate, therefore, cannot restore possession to a person who has been wrongfully dispossessed. A party in possession is legally entitled to defend his possession against another seeking to eject him by force.

This section does not apply to disputes regarding *ijmalee* property. Such disputes are matters for private arrangement. A dispute for the right to receive rent in a certain proportion is totally different from a dispute for possession of land, or the produce thereof. The proper procedure is that pointed out by Section 26 of Regulation V, 1812, as modified by Regulation V, 1827 (1 R. J. P. J.; 17 W. R., 33).

This section does not imply that any one who can show a possession prior to the Magistrate's award is entitled to have it set aside, but that the party out of possession must prove his title in the Civil Courts. Before acting the Magistrate must satisfy himself that a breach of the peace is likely to occur, and record his reasons for his belief, and until he has done so he cannot legally interfere. Then, the only question for trial is that of possession, without any reference to the *right* of possession. The question of possession must be decided on evidence taken by the Magistrate on oath; and the Magistrate is bound to dispose of the question of possession. Proceedings taken under this section are judicial proceedings, and no appeal lies. Orders under this section are only binding on *actual parties to the case*.

A regular proceeding should be recorded previous to a case of disputed possession of land being adjudicated under this section. The final order should only declare the party whom the Magistrate may find to be in possession to be entitled to remain in possession. To order the Police *to give possession* is irregular (2 R. J. P. J., 37, *Queen v. Grigamonee*).

Documentary evidence alone is not sufficient; parol evidence on either side should be admitted if procurable (3 R. C. C. R., 75). A Magistrate may satisfy himself of the existence of a dispute likely to induce a breach of the peace from recorded evidence in other cases (18 W. R., 64).

It would be highly technical and unnecessary to interfere with a Magistrate's order under this section, on the ground *that* the Magistrate had not formally stated that he was satisfied that a dispute likely to induce a breach of the peace existed, when obviously the Magistrate had information of that kind before him (Cr. R., 6 W. R., 4).

A Magistrate cannot proceed, under this section, in a case of dispute arising out of a right of succession to a muth and its appurtenances, but should apply to the Judge, under the provisions of Act XIX of 1841, to appoint a Curator, or make some order with regard to the property till the right of succession is determined. The grant of a certificate under Act XXVII of 1860 does not decide the title to such land (Cr. R., 11 W. R., 23; see also 2 B. L. R., 27). Where property is wholly submerged by a river, any land forming afterwards on the site will, when the owner-

ship of that site is proved to exist in the former owner, remain in him, and the accretions will not belong to the adjacent proprietor.

A Magistrate has no power to dismiss a case he once takes up under this section, merely because the parties neglect to file their statements on the day appointed (11 W. R., 9). The power of attaching land—regarding which there is a dispute—conferred on a Magistrate by this section, extends to disputes as to possession of land of which rival zemindars are in possession by their ryots (15 W. R., 1). The mere service of a notice of a *mofussil naib*, who takes no steps whatever to consult his employer, or act under his directions, is not such a notice as is contemplated by this section in a case of dispute regarding possession of land.

(319) 531. If such Magistrate decides that neither of the parties is in possession, or is unable to satisfy himself as to *which person is in possession* of the subject of dispute, he may attach it until a competent Civil Court shall have determined the rights of the parties, or who ought to be in possession.

If previous possession cannot be ascertained, Magistrate may attach subject of dispute.

Which person is in possession.—With reference to the attachment by Magistrate of the subject of dispute laid down in this section, it has been ruled that Magistrate should decide the question of possession, if possible, so as to avoid attachment. And it is requisite for the Court directing attachment to order release after the rights of the parties have been decided in a competent Civil Court. (See *Harvey v. Brice*; *Queen v. Hanee Lalla*; and Letter No. 200 of March, 1866, in W. R.) The attachment continues until the right of possession has been determined by a regular suit (11 W. R., 532).

Only when neither party has succeeded in proving his possession, or when the case is one of doubtful possession, can the Magistrate proceed under this section (8 W. R., 366). A Sessions Judge has no power to interfere with an order of the Magistrate attaching disputed land under this section (15 W. R., 1).

A Magistrate may lease land attached under this section (*Greesh Chunder Doss, Lessee*, 17 W. R., 38). But Collectors cannot manage estates attached under this section (5 W. R., 3).

(320) 532. If a dispute arise concerning the right of use of any land or water, or any right of way, such Magistrate within whose jurisdiction the subject of dispute lies may inquire into the matter; and if it appears to him that the subject of dispute is open to the use of the public, or of any person or of any class of persons, such Magistrate may order that possession thereof shall not be taken or retained by any

Disputes concerning right of use of land or water.

one to the exclusion of the public, or of such person, or of such class of persons, as the case may be, until the person claiming such possession shall obtain the decision of a competent Civil Court adjudging him to be entitled to such exclusive possession.

Provided that such Magistrate shall not pass any such order if the matter be such that the right of use is capable of being exercised at all times of the year, unless such right has been ordinarily exercised within three months from the date of the institution of the inquiry, or, in cases where the right of use exists at particular seasons, unless such right has been exercised during the last of such seasons before the complaint.

This section does not apply to a right to cultivate land. It refers to rights of common way, public watercourses, running streams, easements, &c.

There is nothing in this section which makes it necessary that a breach of the peace is likely before a Magistrate can interfere. But the Magistrate has a discretion whether he will interfere in a case of a dispute relating to the possession of land under this section. The complainant must make out a sufficient case for the summary interference of the Magistrate under that section. This section is not intended to provide a substitute for a civil suit to declare the rights of the parties, but only empowers the Magistrate to order that possession shall not be taken by any party to the exclusion of the public, until the party claiming possession obtain a decree for exclusive possession.

So long as the bed of a navigable river is washed by the ordinary flow of the tide at a season when the river is not flooded, it remains *publici juris*; or if it is vested in any one, it is vested in the Crown, not under Regulation XI of 1825, or for mere fiscal purposes, but as representing, and, as it were, a trustee for the public. A channel which can be crossed on foot only at the extreme ebb of the tide, and probably for some short time before and after, is not "fordable" within the meaning of Clause 3, Section 4, Regulation XI of 1825 (14 W. R., 352). A right of way or water across the land of another is a right of *use of land* within the meaning of this section.

Where the only evidence offered is that of user, it should be such as to show satisfactory acts of enjoyment exercised as a matter of right and permitted uninterruptedly for some considerable length of time (4 M. H. C. R., 26).

533. Whenever a local inquiry is necessary for the purposes of this chapter, any Magistrate of the first class may depute any Magistrate subordinate to him to make the inquiry, and may furnish him with such instructions, consistent with

Local inquiry to
determine boundary
dispute.

the law for the time being in force, as may seem necessary for his guidance, and may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid.

This section has been taken from the provisions of Sections 2 and 3, Regulation XI of 1824.

534. Whenever in any Criminal Court any person is convicted of an offence attended with criminal force, and it appears to such Court that by such criminal force any person has been dispossessed of any immovable property, the Court may order such person to be restored to possession.

No such order shall prejudice any right over such immovable property which any person may be able to show in a civil suit.

This section has been added by the present enactment, Act X of 1872.

(321) 535. Nothing in this chapter shall affect the powers of a Collector, or a person exercising the powers of a Collector, or of a Revenue Court.

Saving of powers of Collectors and Revenue Courts.

CHAPTER XLI.

OF THE MAINTENANCE OF WIVES AND FAMILIES.

This chapter contains the provisions of Chapter XXI, Act XXV of 1861; and provision is made, that an order of maintenance may be enforced as the warrant for the levy of a fine, in any district in which the person to whom the order is addressed may happen to be.

(316) 536. If any person, having sufficient means, neglects or refuses to maintain his wife or legitimate or illegitimate child unable to maintain himself, the Magistrate of the District, or a Magistrate of a division of a District, or a Magistrate of the first class may, upon due proof thereof *by evidence*, order such person to make a monthly allowance for the maintenance of his wife or such child at such monthly rate, not exceeding fifty rupees in the whole, as to such Magistrate seems reasonable. Such allowance shall be payable from the date of the order.

If such person wilfully neglects to comply with this order, such Magistrate may, for every breach of the order, by warrant, direct the amount due to be levied in the manner provided for levying fines; and may order such person to be imprisoned, with or without hard labour, for any term not exceeding one month *for each month's allowance remaining unpaid*.

Provided that, if such person offers to maintain his wife on condition of her living with him, and his wife refuses to live with him, such Magistrate may consider any grounds of refusal stated by such wife; and may make the order allowed by this section notwithstanding such offer, if he is satisfied that such person is living in adultery, or that he has habitually treated his wife with cruelty.

No wife shall be entitled to receive an allowance from her husband under this section, if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, *or if they are living separately by consent*

The portions of this section printed in italics show the alterations made by the present enactment, Act X of 1872.

European British subjects are amenable under this chapter. This point, which was before doubtful, is now set at rest by the provisions of Section 11, *ante*, which lays it down that "the provisions of this Act shall apply to all persons without distinction of race, unless a contrary intention is expressed." This section empowers a Magistrate to *order* maintenance to children legitimate and illegitimate, and to wives, but not to unmarried women in a state of pregnancy. The inability of a husband and wife to agree to live together is no ground for decreeing a separate maintenance to the wife (6 W. R., 59). An order of maintenance under this section is a "judicial proceeding of a Criminal Court," but no appeal lies against such order, but it is open to revision by the High Court (5 Bo. H. C. R., 81). Where a Criminal Court ordered a husband to pay a sum of money monthly towards the maintenance of his wife and children, and a Civil Court subsequently, on the motion of the husband for restitution of conjugal rights, gave the husband a decree. *Held*, that the order of the Criminal Court ceased to have effect from the date of the decree of the Civil Court (13 W. R., 52).

When a wife obtains a decree for a judicial separation on the ground of her husband's cruelty and adultery, and there is nothing to impeach her own conduct, the Court will allow her to have the custody of the children (6 B. L. R., 318). A wife who is a minor, and too young to live with her husband, is, nevertheless, entitled to maintenance while living with her parents or guardians (4 P. R., 45).

Should a person be aggrieved by the amount of an order under this section, he ought to apply under the following section to have it reduced (9 W. R., 1). This section does not deprive a wife of any remedy she may be entitled to from the Civil Courts (6 W. R., 57). The words "due proof" in this section mean legal proof on oath (13 W. R., 19).

By the principles of *Mahomedan* Law, the right of a wife to maintenance is expressly recognized; so much so, that if the husband be absent and have not made any provision for his wife, the law will cause it to be made out of his property; and in case of divorce, the wife is entitled to maintenance during the period of her probation.

There is a recognized species of reversible divorce, which is effected by the husband comparing his wife to any member of his mother, or some other relation prohibited to him, which must be expiated by emancipating a slave, by alms, or by fasting. This divorce is technically termed *Zihar* (Mac. H. and M. L. pp. 215 and 219).

Among *Hindoos* marriage is not merely a civil contract, but a sacrament. Women are betrothed at a very early age, and this betrothment constitutes, in fact, marriage. The contract is binding and valid; it is complete and irrevocable on the performance of certain ceremonies (see Ward on *Hindoos*, vol. i, 130, *et seq.*) without consummation. In all cases, and for whatever cause a wife may have been deserted, she is entitled to sufficient maintenance. In modern practice, a husband considers it quite sufficient to maintain a superseded wife by providing her with food and raiment. Adultery is a criminal but not a civil offence, and an action for damages as preferred against the adulterer by the husband will not lie (M. H. and M. L., 62—64.)

A Magistrate can issue a warrant for the collection of fifteen months' arrears of maintenance. The only consequence of issuing the warrants in the aggregate is that only one month's imprisonment can be awarded in default. There seems no ground in reason or law for defendant being permitted further to benefit by his disobedience and the complainant's neglect (6 M. J., 383).

The second paragraph of this section makes it clear that under this section a Magistrate has no power to make an order for payment of any sum for maintenance for any period prior to the date on which the complaint was lodged.

A decision of the Civil Court, refusing to enforce a contract or agreement against a man for the maintenance of a woman, cannot preclude either the woman from applying, or a Magistrate from making, an order under this section, for the maintenance of their illegitimate daughter. The question whether the evidence before the Magistrate was sufficient to enable him to make that order was a matter for him—not for the High Court—to consider (17 W. R., 49).

(317) 537. On the application of *any person receiving or*
Alteration in allow-
ance. ordered to pay a monthly allowance under
the provisions of Section 536, and on
proof of a change in the circumstances of such person, his
wife or child, the Magistrate may make such alteration in
the allowance ordered as he deems fit, provided the total
sum of fifty rupees a month be not exceeded.

The Magistrate acting under this section need not be the same Magistrate who passed the order under Section 536, although the latter be still in the district. *The Magistrate* in this section means, the Magistrate presiding over the Court with which jurisdiction in the matter rests (8 P. R., Cr. J., 5).

The words *any person receiving* have been added to this section by the new enactment; formerly it was only on the application of the defendant that the Magistrate could act. The proviso to this section, that *the sum of fifty rupees per mensem be not exceeded*, have also been added by the present Act X of 1872.

538. A copy of the order of maintenance shall be given
Enforcement of order. to the person for whose maintenance it is
made, or to the guardian of such person,
and shall be *enforceable* by any Magistrate in any place
where the person to whom the order is addressed may be,
on the Magistrate being satisfied as to the identity of the
parties, and the non-payment of the sum claimed.

This section has been added by the present enactment, Act X of 1872. The order for maintenance is *enforceable* in the manner provided for levying fines, as laid down in Section 307, *ante*.

PART XII.

MISCELLANEOUS PROVISIONS.

CHAPTER XLII.

MISCELLANEOUS.

(444) 539. The procedure prescribed by this Act shall be followed, so far as it can be, in all miscellaneous criminal cases and proceedings which are instituted in any Court.

Procedure in miscellaneous criminal cases and proceedings.

By this section it is enacted that the procedure prescribed by this Act shall be followed in cases which shall be instituted in any Court, so that a case of "theft and murder" committed prior to 1st January, 1862, is triable by a S. J. under this Act, and the Judge can pass any sentence (short of death) to which the prisoner is liable under the old substantive law, subject to reference, if claimed, and appeal under any circumstances (R. J. P. J., 108, vol. 5). With reference to the P. C. on the principle of the well-known legal maxim, "*nova constitutio futuris formam imponere debet non prateritis*," that enactment has no application to offences committed before it came into operation. "The injustice and impolicy of *ex facto* or retrospective legislation are apparent" (says Broom in his "Legal Maxims," p. 43) "with reference to criminal laws." It would, as observed by Mr. Justice Blackstone, be highly unreasonable, after an action is committed then for the first time, to declare it to have been a crime, because it was impossible that the party could foresee that an action, innocent when it was done, would be afterwards converted into guilt by a subsequent law. With reference, therefore, to the operation of a new law, the maxim of Paulus adopted by Lord Bacon applies:—*Nunquam crescit ex post facto praterite delicti aestimatio*. The law does not allow a latter fact, a circumstance, or matter subsequent, to extend or amplify an offence; it construes neither penal laws nor penal facts by intendment, but considers the offence in degree as it stood at the time when it was committed.

(441) 540. Nothing in this Act shall be held to alter or affect the jurisdiction or procedure of the Magistrates or Commissioners of Police, or the Police in the Presidency Towns,

Saving of jurisdiction of Presidency Police Magistrates.

except so far as this Act expressly provides for the same.

(442) 541. Nothing in this Act shall be held to alter or affect—

Saving of jurisdiction and procedure of Landholders, Heads of Village, Village Police Officers, Cantonment Magistrates.

(a.) The jurisdiction, or procedure of landholders specially empowered according to law in the Presidency of Bombay.

(b.) The jurisdiction or procedure of the heads of villages in the Presidency of Fort St. George.

(c.) The jurisdiction, or procedure of village Police Officers in the Presidency of Bombay.

(d.) The jurisdiction or procedure of any officer duly authorized and appointed under the laws in force in the Presidencies of Fort St. George and Bombay respectively, for the trial of petty offences in military bazaars at cantonments and stations occupied by the troops of those Presidencies respectively.

In Schedule IV to this Act the powers of Magistrates have to some degree been extended. There are many offences punishable under the Indian Penal Code, with very severe sentences, but which embrace within their definitions crimes of every shade, from the offence which demands the heaviest penalty to that which is suitably punished by a short term of imprisonment. In extending the power of the Courts to try offences, discretion has been left them to exercise jurisdiction or to commit for trial as the circumstances of each case may demand. On this question of "degrees of crime" and the "discretion left by law to the Courts," Morgan, C. J., in *R. v. Verayee*, 7 M. J., 296, says: "The tendency of a punishment to repress crime is, no doubt, a very important element in the determination of the punishment to be inflicted, but it is by no means the only one. Where the Legislature has recognized two sorts of punishment, it has implicitly recognized degrees in crimes technically the same. Those degrees are to be determined by the circumstances of the case, and among them, and perhaps the most important of them, are the state of mind of the offender, and the degree of moral obliquity displayed by the act. The fear of shame and disgrace would, on the mechanical theory of punishment, be additional reason for inflicting the most severe, because the counteracting motive must be proportioned to the strength of the temptation. Neither real science nor humanity, however, sanctions this theory, and its consistent administration would restore the 160 capital punishments of the Georgian Code. There is an undoubted connection, though one not easily formulated, between the ethical quality of a crime and its proper punishment; and it seems perfectly clear, that where two punishments are permitted, the crime may be one which imperfectly calls for the infliction of the minor.

Amendment 46 of 1874.—In the third column of the fourth

schedule to the Code of Criminal Procedure, opposite No. 323, for the words "Shall not arrest without warrant," the words "May arrest without warrant" shall be substituted; and opposite No. 428, for the word "Ditto," the words "May arrest without warrant" shall be substituted.

Amendment 47 of 1874.—In this Act, "section" means section of the Code of Criminal Procedure.

And all references to the Code of Criminal Procedure made in Acts heretofore passed or hereafter to be passed shall be read as if made to such Code as amended by this Act.

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